

Pro Bono Asylum Representation
Manual:
An Overview of Asylum Law &
Procedure



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Please Note: This Manual is a brief guide to asylum practice and does not purport to discuss all aspects of asylum practice or to immigration practice related to asylum proceedings. Additional sources, including applicable statutes and regulations, should be consulted throughout preparation of any asylum case. Many resources are referenced in this manual. Immigration law changes quickly, and practitioners are cautioned to ensure that current law and procedure is followed at all times.

The Advocates for Human Rights gratefully acknowledges the **Midwest Immigrant & Human Rights Center** for permission to use and modify their procedural manual, produced in 2000, for training of The Advocates volunteers at our annual Asylum Conference. This manual was initially prepared by Thomas Liddy from the University of Chicago, and Amanda Adams, law graduate from Chicago-Kent College of Law, for the Midwest Immigrant and Human Rights Center. The Advocates for Human Rights has made substantial modifications to this manual and accepts all responsibility for the contents contained herein.

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THE *PRO BONO* PROGRAM

The Advocates for Human Rights' Refugee & Immigrant Program seeks to promote and protect the human rights of immigrants, refugees and asylum seekers through advocacy and education. Founded in 1984, the Refugee & Immigrant Program today provides free legal advice and representation to over 1000 indigent clients annually, and provides full representation to nearly 200 asylum seekers. The Advocates' clients come from every region of the globe, seeking protection from persecution on account of race, religion, ethnicity, social group membership, or political opinion. Unless granted asylum, our clients may be forced to return to countries where they face detention, torture, or death. Although asylum applicants in the United States have the right to counsel, free counsel is not provided by the government, leaving many asylum seekers to navigate complex legal proceedings without representation.

The Advocates for Human Rights recruits and trains volunteer attorneys, legal assistants, and students to help individuals who have fled persecution in their countries of origin. Volunteers represent asylum seekers *pro bono* at all phases of the asylum process, including administrative applications, immigration court hearings, administrative appeals, and petitions for review in the federal courts of appeal. *Pro bono* representation is critical – applicants represented by counsel in removal proceedings are six times more likely to be granted asylum than those appearing *pro se*.

Lack of experience with asylum law is not an obstacle to helping these individuals get asylum. Lawyers inexperienced in asylum law receive training and are paired with experienced immigration practitioners. The volunteer attorney is primarily responsible for all aspects of the case, including interviewing the client; preparing the application for asylum and supporting documents; and accompanying the client to the asylum interview or representing the client at the removal hearing or on appeal. The consulting attorney is available to answer questions, discuss strategy, and review documents before submission. The Advocates provides access to staff attorney support, sample briefs, and documentation on conditions in the country at issue. The Advocates coordinates a panel of trained volunteer interpreters. A panel of health care professionals is available to provide forensic documentation on a volunteer basis.

Clients' lives are literally at stake in asylum proceedings. Clients are most often granted asylum when their cases are thoroughly prepared. Asylum cases require intensive pre-hearing preparation, and volunteers should expect to spend substantial time over the life of the cases. The volunteer is committed only to handling the client's asylum case – not other legal matters or immigration-related problems; referrals to an appropriate agency are available from The Advocates.

Obtaining a Case:

Contact the staff at the Refugee and Immigrant Program at **(612) 341-3302** or log on to <http://www/probono.net/asylum> to obtain a case. A case will be transmitted to you with all necessary information and forms to begin representation. Malpractice insurance is available for volunteers through the generous partnership of the Volunteer Lawyers Network.

THE BASICS OF ASYLUM LAW

Background

Individuals fleeing persecution have the right to seek asylum. This most fundamental right is guaranteed by the 1951 United Nations Convention relating to the Status of Refugees and implemented in the 1967 United Nations Protocol relating to the Status of Refugees. The United States codified refugee protection and the procedures for asylum in the Refugee Act of 1980, made part of the Immigration & Nationality Act (INA).

Responsibility for the implementation and enforcement of most U.S. immigration law, including asylum and refugee law, is shared between the Department of Homeland Security (DHS) and the Department of Justice's Executive Office for Immigration Review (EOIR). The former INS (Immigration & Nationality Service) was dissolved and its duties divided among three agencies under DHS – U.S. Citizenship & Immigration Service (USCIS), Customs & Border Protection (CBP), and Immigration & Customs Enforcement (ICE). USCIS adjudicates applications for immigration benefits; CBP inspects and admits non-citizens into the United States; and ICE investigates immigration violations, as well as detains and removes violators of immigration law. EOIR primarily conducts removal proceedings and adjudicates appeals of decisions in removal proceedings. Asylum seekers may encounter any and all of the various immigration agencies during the asylum process.

To qualify for asylum, the applicant must be physically present in the United States.¹ The Attorney General may grant asylum to an applicant who can establish past persecution or a “well-founded fear” of future persecution in his or her home country on account of race, religion, nationality, membership in a particular social group, or political opinion. Asylum is discretionary and may be denied even when the applicant is statutorily eligible. Certain bars apply, such as commission of a serious crime, the persecution of others, or material support to a terrorist organization, which may make an applicant ineligible for asylum.

Obtaining asylum provides significant benefits to the recipient. An asylee is allowed to remain indefinitely in the United States, although asylum may be terminated if the asylee is found to have committed fraud in obtaining asylum or if the asylee no longer has a fear of return to their country. An asylee is authorized to work. One year after the grant of asylum, an asylee may apply to adjust status to lawful permanent resident. An asylee's spouse and unmarried children under 21 can obtain asylee status with the asylee or follow the asylee to join them in the United States. Finally, an asylee has the right to travel and return to the United States in asylum status.

¹ Adjudication of refugee status takes place outside U.S. borders and is handled by the U.S. Refugee Program (USRP). Individuals approved as refugees are then resettled to the U.S. and enter the country with refugee status. They do not go through an asylum adjudication in the U.S.

Applying for Asylum

Within the United States, individuals fleeing persecution can apply for asylum either affirmatively or defensively. Persons applying for asylum affirmatively are those who came to the United States, either legally or illegally, and who have not been placed in removal proceedings by the DHS. An affirmative application is adjudicated by one of eight regional Asylum Offices, operated by Citizenship and Immigration Services (USCIS). Minnesota is under the jurisdiction of the Chicago Asylum Office. By contrast, individuals arrested by Immigration & Customs Enforcement (ICE) or Customs & Border Protection (CBP) are placed in removal proceedings. Upon filing of the Notice to Appear (NTA) in an EOIR Immigration Court, jurisdiction over the asylum application transfers to the court. Administrative review of Immigration Court decisions is handled by the Board of Immigration Appeals (BIA).

Legal Test for Asylum/Refugee Protection

The Immigration and Nationality Act (INA), codified at 8 U.S.C. §§ 1101 et seq., governs U.S. immigration law, with corresponding regulations found at 8 C.F.R. The Board of Immigration Appeals (BIA) issues decisions binding on the Immigration Courts and on the Department of Homeland Security. Decisions of the U.S. Courts of Appeals and the U.S. Supreme Court also govern immigration law. In addition, various agency memoranda as well as U.S. and international policy guidelines may provide guidance in particular situations.

The law of asylum in the United States is founded upon the 1951 Convention relating to the Status of Refugees. The Immigration and Nationality Act (INA) sets forth the legal test for asylum eligibility. A person may qualify for asylum if he or she meets the international definition of a refugee. A refugee is defined as:

Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself to the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Immigration and Nationality Act (INA), §101 (a)(42)(A); 8 U.S.C. §1101(a)(42)(A).² Amending INA §208(b) (1), 8 U.S.C. §1158 (b) (1), the REAL ID Act adds the following to the law of asylum: "The burden of proof is on the applicant to establish the applicant is a refugee within the meaning of § 101 (a)(42)(A). To establish that the applicant is a refugee the applicant must establish that race, religion, nationality, membership in a

² The REAL ID Act, enacted into law on May 11, 2005, as part of a military spending bill, has made substantial changes to U.S. asylum law. Pub. L. 109-13, 119 Stat. 231 (May 11, 2005).

particular social group or political opinion was or will be at least one central reason for persecuting the applicant.”

Definition of Persecution

Neither the Immigration and Nationality Act nor accompanying regulations define persecution. Federal courts and the BIA have broadly defined persecution as “the infliction of suffering or harm upon those who differ...in a way that is regarded as offensive.” *Desir v. Ilchert*, 840 F. 2d 723, 727 (9th Cir. 1988); *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985). Another definition is “the infliction or threat of death, torture, or injury to one’s person or freedom” on account of one of the five statutory grounds [race, religion, nationality, political opinion and social group]. *Regalado-Garcia v. I.N.S.*, 305 F. 3d 784,787 (8th Cir. 2002). Threats to life or freedom are uniformly found to be persecution. Physical abuse, even when not life-threatening will also generally constitute persecution. However, the suffering or harm experienced must amount to more than mere harassment. *Balazoski v. INS*, 932 F. 2d 638, 642 (7th Cir. 1991). Additionally, being subjected to various types of harm that in and of themselves do not amount to persecution may be considered persecution when taken in the aggregate. Such harms might include:

1. Arbitrary interference with a person’s privacy, family, home or correspondence;
2. Relegation to substandard dwellings;
3. Exclusion from institutions of higher learning;
4. Enforced social or civil inactivity;
5. Passport denial;
6. Constant surveillance; and
7. Pressure to become an informer

Who is the Persecutor?

The refugee definition states that a person can qualify for protection only if he or she is “unable or unwilling” to avail himself or herself of the protection of his or her own government. The government must be either unable or unwilling to protect the person, which occurs when either the government is the persecutor and is therefore unwilling to protect the person; or when the persecutor operates with impunity and is unable to be controlled by the government. The government can include local government officials, police, or security forces, among others; there is no requirement that the leader of the nation be targeting the individual or aware of the persecution. The persecutor may also be a group the government is unable to control, such as a guerilla force, death squad, paramilitary group, gang or rogue security forces. Groups the government is unwilling to control, such as clans, families (such as in domestic violence or FGM cases), or society at large in cases of severe racial, gender or sexual orientation discrimination, may also be considered persecutors under the law.

Well-Founded Fear

In order to establish a “well-founded fear” of persecution, an asylum applicant need only show a reasonable *possibility* that he or she will be persecuted. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). The U.S. Supreme Court has stated that the following is sufficient to establish a well-founded fear:

1. “[H]aving a fear of an event happening when there is less than a 50% chance that it will take place, and
2. Establishing a 10% chance of being shot, tortured, or [being] otherwise persecuted.” *Id.* See also *Cigaran v. Heston*, 159 F. 3d 355, 357 (8th Cir. 1998); *Kratchmarov v. Heston*. 172 F. 3d 551, 553 (8th Cir. 1999).

In order to demonstrate well-founded fear, it is necessary to demonstrate both subjective and objective reasonable fear. *INS v. Cardoza-Fonseca*, supra. See also *Loulou v. Ashcroft*, 354 F. 3d 706, 709 (8th Cir. 2003), amended by 2004 U.S. App. LEXIS 8347 (8th Cir. 2004). In order to satisfy the subjective component, a person must show that he or she actually has a fear of returning to his or her country of origin. In order to satisfy the objective component, a person must do two things:

1. Present specific facts through objective evidence or through persuasive, credible testimony; and
2. Show that given the evidence presented, a reasonable person would experience a fear of persecution.

Matter of Mogharrabi, 19 I&N 439, 441 (BIA 1987); see also *Ghasemimehr v. INS*, 7 F. 3d 1389, 1390 (8th Cir. 1993).

In *Matter of Mogharrabi*, supra, the BIA set forth the following four elements which an applicant for asylum must show in order to establish a well-founded fear of persecution:

- (1) The applicant possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; and
- (2) The persecutor is aware, or could become aware, that the applicant possesses this belief or characteristic; and
- (3) The persecutor has the capability of punishing the applicant; and
- (4) The persecutor has the inclination to punish the applicant.

Matter of Mogharrabi, 19 I&N Dec. at 446; *INS v. Elias-Zacarias*, 112 U.S. 812 (1992).

Past Persecution

Under U.S. asylum law, a determination of past persecution creates a rebuttable presumption of future fear of persecution. 8 C.F.R. § 208.13(b)(1); *Matter of Chen*, 20 I.&N. Dec. 16 (1989). See also *Fisher v. INS*, 291 F. 3d 491, 497 (8th Cir. 2002). The presumption relates only to fear of harm based on facts that give rise to the original persecution. 8 C.F.R. §208.13(b)(1). Once established, the government then has the burden of rebutting the presumption. The government may do this by (1) establishing by a preponderance of the evidence that conditions in the home country have changed to the extent that the applicant no longer has a well-founded fear, or (2) showing that by moving to another part of his or her country the applicant could avoid the persecution and that it

would be reasonable to expect him or her to do so. 8 C.F.R. § 208.3(b)(1)(iA)&(B) (2003).

Changed Country Conditions

Where past persecution is established, the government has the burden to prove that the applicant no longer has a well-founded fear of persecution due to the change in country conditions. At least one court has recognized that a Department of State Country Report on Human Rights Conditions, standing alone, is not sufficient to rebut the presumption of future persecution when a petitioner has established past persecution. *Molina-Estrada v. INS*, 293 F.3d 1089 (9th Cir. 2002); *see also Menendez-Donis v. Ashcroft*, 360 F.3d 915, 917 (8th Cir. 2004) (holding that country conditions had changed sufficiently to support denial of asylum). The applicant for asylum may still prevail on his or her asylum claim, even in the face of changed country conditions. He or she must show either that there are “compelling reasons” for being unwilling or unable to return to his or her country or that he or she would suffer “other serious harm” if removed to that country. 8 C.F.R. § 1208.13(b)(1)(iii); *See also Matter of Chen*, 20 I.&N. Dec. 16 (BIA 1989); *But see Francois v. INS*, 283 F.3d 926, 930-31 (8th Cir. 2002). The serious harm does not have to be linked to the persecution.

Tip! Minnesota has a large population of immigrants and asylum seekers from Liberia, which is gradually emerging from a long civil war. Most pending asylum cases from Liberia will need to address the issue of changed country conditions. Please pay special attention to the “compelling reasons” and “other serious harm” exceptions if you have an asylum client from Liberia and be prepared to raise these arguments in your claim. As always, please contact your consulting attorney and/or The Advocates if you need additional guidance.

Internal Relocation

Factors to be considered when determining whether the applicant could relocate internally within his or her country include the following: ongoing civil strife; strength or weakness of government infrastructures; geographical limitations; and social or cultural constraints. 8 C.F.R. § 1208.13(b)(3). *Hagi-Salad v. Ashcroft*, 359 F.3d 1044, 1048 (8th Cir. 2004) (stating that the internal relocation issue does not turn on whether the petitioner reasonably fears country-wide persecution. Rather the inquiry turns on whether relocation would be reasonable under a potentially broad range of factors). If the feared persecutor is the government or if past persecution has been shown, the burden to establish the reasonableness of internal relocation falls on the government to do so by a preponderance of the evidence. *See* 8 C.F.R. § 1208.13(b)(3)(ii).

The Five Grounds of Asylum & “On Account of”

In order to establish asylum eligibility, the applicant must show that the past or feared persecution is “on account of” five protected grounds: race, religion, nationality, political opinion, and membership in a particular social group. The applicant must establish he or

she has the characteristics necessary to fall in one of the five protected grounds, as detailed below *and* that the characteristic is the reason for the persecution. An asylum applicant is not required to show the exact motivation of the persecutor, but does need to establish a “clear probability” of persecution on account of one of the five grounds. The REAL ID Act of 2005 amended INA § 208(b)(1)(B) to state that an applicant for asylum has the burden of establishing that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant.³ There may be mixed motives for the persecution, but it must be proven that the central reason for persecution is on account of one of the five grounds.

The first three categories have fairly clear applications; the latter two are more expansive and controversial in application.

RACE

The term “race” includes “All kinds of ethnic groups that are referred to as ‘races’ in common usage.” United Nations High Commissioner on Refugees (UNHCR) Handbook at ¶ 68. For example, ethnic Albanians and Chechens would qualify as “races” under this definition. The following cases provide additional examples of a race based asylum claim:

- A Hindu Indian in Fiji was physically attacked on three separate occasions, which was found to rise to the level of persecution. *Chand v. INS*, 222 F.3d 1066 (9th Cir. 2000).
- Black Mauritanian citizen argued that the Caucasian dominated government persecuted him based on race. *Diallo v. INS*, 232 F.3d 279 (2nd Cir. 2000).
- Chinese individual living in the Philippines was not found to have established persecution as the claim was largely speculative. *Limsico v. INS*, 951 F.2d 210 (9th Cir. 1991).

RELIGION

Persecution on account of religion can include the prohibition of public or private worship, membership in a particular religious community, or religious instruction. UNHCR Handbook at ¶ 77 - 79. Serious discrimination towards a person because of his or her membership in a particular social group such as a religion or religious community may also constitute persecution on account of religion. *Id.*; *See Korablina v. INS*, 158 F.3d 1039 (9th Cir. 1998) (Russian woman of Jewish faith in Ukraine granted asylum based on religion). Mere membership in a particular religious community will not generally be sufficient to establish an asylum claim. *Refahyat v. INS*, 29 F.3d 553, 557 (10th Cir. 1994). In one case, the fervency of a family member’s religious beliefs have

³ The legislative history of the Real ID Act shows the phrase “a central reason” in the House of Representatives version of the bill was replaced with the phrase “at least **one central reason**.” This change demonstrates that a persecutor may have more than one motive to cause harm and that the asylum seeker need not prove that the protected ground was foremost in the persecutor’s mind. (*See* Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act Is a False Promise*, 43 Harv. J. on Legis. 101, 119 (2006).

been sufficient to establish a religion based asylum claim. *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000) (Muslim woman who suffered persecution due to her father's orthodoxy found to suffer persecution on account of religion).

NATIONALITY

The term "nationality" includes citizenship or membership in an ethnic or linguistic group and often overlaps with race. UNHCR Handbook at ¶ 74. *See Bradvica v. INS*, 128 F.3d 1009 (7th Cir. 1997) (Croatian who lived in the former Yugoslavia (now Bosnia-Herzegovina) had suffered harassment, not rising to the level to persecution); *Petrovic v. INS*, 198 F.3d 1034 (2nd Cir. 2000) (In the case of an ethnic Serb in Croatia, it was acceptable to take notice of changed conditions in the country).

POLITICAL OPINION

An applicant's *actual* political opinion may serve as a basis for persecution. For example, a student involved with democratic activism was granted asylum following a governmental crackdown on activists in Nigeria. *Akinmade v. INS*, 196 F.3d 952 (9th Cir. 1999). Further, a political opinion *imputed* to the applicant may also serve as a basis for persecution. An "imputed opinion" is defined as an opinion that the persecutor believes the applicant to have, regardless of the applicant's actual opinion or lack of opinion. Often family members are imputed to have the same opinion, regardless of their actual beliefs. In one case, the family of a Guatemalan military officer was kidnapped and subsequently received asylum due to the fact that the guerillas had imputed to the family members the opinions of their relative military officer. *Rios v. Ashcroft*, 287 F.3d 895 (9th Cir. 2002).

Persecution on account of political opinion includes persons persecuted due to coercive population control programs, forced abortion, forced sterilization, or fear of persecution because of refusal to participate in a program of forced population control. Only 1000 persons may be granted refugee status on this basis each year. *INA § 101(a)(42)(B)*.

SOCIAL GROUP

"Social group" is a broad phrase. According to the UNHCR, a social group is composed of "persons of similar background, habit or social status." UNHCR Handbook at ¶ 72. Generally it is understood as a group of people who share or are defined by certain characteristics such as:

1. Age. *See Escobar v. Gonzales*, 417 F.3d 363 (3d. Cir. 2005) (Finding social group too vague and encompassing where Honduran orphan claimed asylum based on being a "poor, homeless youth."); *Matter of S-E-G*, 24 I&N Dec. 579 (BIA 2008) (Holding Salvadoran youth who refused to recruitment into MS-13 criminal gang or their families constitute a particular social group for lack of particularity and social visibility). *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003) (Suggesting that former child soldiers may constitute a social group in future cases).

2. Geographic location
3. Class background
4. Ethnic background
5. Family ties (such as African clan or relative of a high ranking official)
See Lwin v. INS, 144 F.3d 505 (7th Cir. 1998) (Parents of a Burmese student protester were targeted due to family relationship and therefore had an immutable characteristic necessary for social group membership).
6. Gender
7. Sexual orientation

Members of a particular social group must share a “*common immutable characteristic.*” *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985). Such characteristic should be one the applicant (and the group at large) cannot change or should not be required to change. *Id.*

There has been specific case law regarding certain social groups. The BIA has acknowledged that “a Somali clan may be ‘a particular social group’ for purposes of determining whether persecution or fear of persecution is ‘on account of’ that protected ground.” *Matter of H-*, 21 I&N Dec 337, 342-43 (BIA 1996). Persecution on account of sexual orientation is also considered to be within a “particular social group.” *See Boer-Sedano v. Gonzales*, 418 F.3d 1082 (9th Cir. 2005) (Granting asylum when persecution of a gay Mexican man was prompted by his sexual orientation); *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) (Finding that gay men with female sexual identities in Mexico are a particular social group); *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (AG 1994) (Homosexual men from Cuba constitute a particular social group).

Additionally, some gender-based claims have been held to fall within the meaning of social group. *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (Finding that Somali females may constitute a social group); *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999) (Asylum denied to woman claiming social group of Guatemalan women subjected to severe abuse by their husbands.)⁴ The law has recognized the practice of female genital mutilation (FGM) as persecution on account of gender. *See Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Hassan v. Gonzalas*, 484 F.3d 513 (8th Cir., 2007).⁵ Many women in Africa have been subjected to FGM; for example, in Somalia nearly 95% of women have had FGM. It is important to ask your client if she has been subjected to FGM as it

⁴ On January 21, 2001, the Attorney General vacated the case and remanded it back to the BIA to reconsider its decision in light of new proposed regulations dealing with the social group issue.⁴ On March 4, 2003, the Attorney General confirmed in Senate testimony that he is “certifying” the case back to his office to issue a new decision under his name, possibly reinstating the original BIA decision, and proposed regulations remain under consideration. Therefore, the BIA’s position on gender-based persecution is in flux in light of the Attorney General’s Actions. Attorneys lodging gender-based claims are advised to proceed cautiously and to keep advised to developments in the area through the Center of Gender and Refugee Studies at the UC Hastings College of the Law (www.uchastings.edu/cgrs). The proposed social group regulations have not yet been promulgated and are still pending approval. The regulations would clearly cover claims based on domestic violence or gender-based persecution.

⁵ Women who have practiced FGM may therefore be considered to be persecutors under this line of reasoning, and can be barred from receiving asylum.

may constitute an additional basis for an asylum claim. However, past FGM alone may not constitute a continuing basis for persecution, particularly in regards to the legal standard for Withholding of Removal (discussed below). *Matter of A-T*, 24 I&N Dec. 296 (BIA 2007); *Cf: Matter of S-A-K- and H-A-H-*, 24 I&N Dec. 464 (BIA 2008). Additionally, a parent's fear that FGM may be practiced on his or her child is not a sufficient basis for an asylum claim without additional factors. *Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007).

Bars to Eligibility for Asylum

Certain individuals are prohibited from applying for or receiving asylum for a variety of legal reasons. The following persons are not eligible for asylum:

1. Aliens who are *persecutors* of others: i.e. if the applicant has subjected someone else to harm on account of one of the protected grounds (INA §208.15 (b)(2)(A)(vi)); It is not settled whether an alien compelled to assist prosecution would exempt himself from prosecutor bar. *Negussie v. Holder*, No. 07-499 (S. Ct. 2009) (Remand the case to let BIA interpret the ambiguous statute to determine whether voluntariness is required for prosecutor bar.)
2. Aliens who are *firmly resettled* within the meaning of 8 C.F.R. §208.15 (b)(2)(A)(vi));
3. Aliens who *previously* filed for asylum and were denied (INA § 208(a)(2)(C); 8 C.F.R. § 208.4(a)(3));
4. Aliens who did not file for asylum within one year of arrival in the U.S., unless they can show changed or extraordinary circumstances that led to their late filing (INA §208(a)(2)(B); 8 C.F.R. §208.4, 208.34);
5. Aliens convicted of an aggravated felony, as defined by immigration law. *See* INA §101(a)(43). The most commonly invoked are:
 1. Drug trafficking-any crime involving distribution, importation or sale of drugs, no matter the amount or the sentence;
 2. The crime of theft, robbery or burglary with one-year sentence whether imposed or suspended; and
 3. A crime of violence with one-year sentence whether imposed or suspended;
6. Aliens convicted of a *particularly* serious crime. Most of the crimes that are considered particularly serious are aggravated felonies under immigration law. A particularly serious crime usually involves violence against persons, or risk of violence to persons. Occasionally, the government may argue that a crime is particularly serious, even though it is not defined as an aggravated felony under immigration law, such as assault with a deadly weapon or robbery with less than a year sentence (INA §208(a)(2)(A)(ii));
7. Aliens who pose a danger to the security of the U.S. (INA §208(a)(2)(A)(iv));
8. Aliens who committed a serious nonpolitical crime (INA §208(a)(2)(A)(iii));
9. Aliens who may be removed pursuant to a *bilateral* or *multilateral* agreement to a safe third country, unless the Attorney General finds it in the U.S. interest to grant asylum. *See* INA §208(a)(2)(A). The U.S. has a Safe Third Country Agreement with Canada.

10. Aliens inadmissible on account of terrorist-related activity, or those providing material support to terrorist groups. INA §208(a)(2)(A)(v).

If any of these conditions are identified in your case, please contact The Advocates staff.

Material Support Bar

The REAL ID Act of 2005 expanded the class of individuals who are inadmissible to the U.S. based on providing material support to terrorists by expanding the definition of “terrorist organization” and the definition of “terrorist activities.” Terrorist organization includes “a group of two or more individuals, whether organized or not, which engages, or has a subgroup which engages in” certain enumerated terrorist activities. Terrorist activities include: use or threat, attempt, or conspiracy to use any dangerous device to endanger the safety of one or more individuals or property. To be granted an exception from this bar, an individual must show that they did not know or should not have known that the group was a terrorist organization or that the activity would further the group’s terrorist activity. *See Pub. L. No. 109-13 § 103. See Also 83 Interpreter Releases 465 – 469, “The Ever-Expanding Material Support Bar: An Unjust Obstacle for Refugees and Asylum Seekers.” Susan Benesch and Devon Chaffee, Volume 83, No. 11, March 13, 2006.*

There are certain categories of individuals who may be exempted from the application of the material support bar, including members of Tier III (undesignated) groups, individuals who have “engaged in terrorist activity” on behalf of a Tier III group, individuals who were engaged in terrorist activity on behalf of a Tier I or II group but did not do so knowingly or voluntarily, and spouses and children of individuals barred due to material support who knew about their family member’s activity. *See Consolidated Appropriations Act of 2008, Pub. L. 110-161, 121 Stat. 1844 § 691(a).* Additionally, certain groups are exempted and not considered terrorist organizations based on activities occurring prior to December 26, 2007. *Id., § 691(b).* It is expected that further guidance will be issued regarding cases involving material support, as many are currently on hold or under review in light of changing regulations. *See USCIS Jonathan Scharfen Memo March 26, 2008.*

ALTERNATIVES TO ASYLUM

Withholding of Removal

Another type of protection available to individuals fleeing persecution, though not as beneficial as asylum, is withholding of removal. INA §241(b)(3); 8 USC §1231 (b)(3). Unlike asylum, withholding is not subject to a one-year filing deadline. In addition, withholding is a mandatory form of relief; not discretionary like asylum. Withholding is usually sought in the following situations: the client filed after the one year deadline and does not have legally sufficient reasons for doing so, *or* the client has committed an

aggravated felony, making him or her ineligible for asylum; *or* there are negative factors in the client's past such as a criminal history that is not felonious but which makes a discretionary grant of asylum questionable; *or* the client is ineligible for asylum due to other factors. Accordingly, withholding of removal should always be sought in the alternative when filing for asylum.

The benefits under withholding are limited. An individual who is granted withholding cannot be removed from the United States to the country from which he or she was fleeing persecution, but can be removed to a third country if one is available. The individual may not adjust his or her status to legal permanent residency, but can obtain work authorization. The individual is also not eligible for family reunification. Further, those granted withholding of removal only are not eligible for a refugee travel document or provided with permission to re-enter the United States without securing advance parole – effectively requiring the person to remain in the United States to maintain status.

A grant of withholding of removal is country specific, and requires the Judge to actually enter an order of removal if that is the only relief granted. *Matter of I-S- & C-S-*, 24 I&N 432 (BIA 2008). Therefore the order frequently is “Client is ordered removed to any country other than X (country of citizenship/nationality).” If the client in fact has status or is able to be removed to another country, that removal order can be executed. Withholding simply protects the client from removal to the country where he or she fears persecution.

Test for Withholding of Removal

In order to satisfy the test for withholding of removal, an individual must show a clear probability of persecution by the government or a group the government cannot control on account of one of the protected grounds. *INS v. Stevic*, 467 U.S. 407 (1984). This is a more difficult burden (greater than 50% chance of persecution) to meet than that for asylum. As in asylum, however, if the individual can show that he or she suffered persecution in the past, then that individual will receive the benefit of a presumption of a well-founded fear of future persecution. Further, withholding of removal is mandatory if the individual meets the above clear probability test and establishes that he or she is not barred from eligibility.

Bars to Eligibility For Withholding of Removal

An individual is not eligible for withholding of removal if he or she:

1. Is a *persecutor*; or
2. Has been convicted of a *particularly* serious crime. *Matter of Y-L-*, 23 I&N Dec. 270. (A.G. 2002). An aggravated felony conviction does not automatically bar an applicant from withholding of removal unless he or she received a sentence of five or more years, imposed or suspended. An aggravated felony is presumed to be “particularly serious.” *See* INA §241(b)(3)(B). Again, other crimes not rising to the level of an aggravated felony may also bar an individual from withholding of removal if found to be

particularly serious. In determining whether a crime is particularly serious, the court will look at:

- a. The nature of the crime, i.e. was it against a person or property;
- b. The circumstances surrounding the crime;
- c. The length of the sentence; and
- d. Whether the crime indicates dangerousness to community.

Practice Tips

Increasingly, Withholding of Removal is being offered by the counsel for the government (Office of Chief Counsel) in certain asylum cases as a sort-of “plea bargain.” It is important to discuss the benefits and drawbacks of withholding with your client in removal proceedings prior to the final hearing so that he or she understands the difference between withholding and asylum. Particularly where the client has family members overseas that he or she may wish to petition to bring to the U.S., withholding is a less attractive option and may not benefit the client. Furthermore, clients granted withholding of removal are now regularly referred to the Detention and Removal section of Immigration and Customs Enforcement for a “custody review” which may result in the client being placed on an electronic monitoring program or being required to comply with monthly in-person check-ins, or other requirements, including applying for a passport from third countries.

Convention Against Torture/Deferral of Removal

The United Nations Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment or Punishment (“CAT”)⁶ prohibits the return of a person to another country where substantial grounds exist for believing that he or she would be in danger of being subjected to torture if returned. *Matter of Y-L, A-G-, R-S-R-*, 23 I&N Dec. 270 (A.G. 2002); *See also Matter of S-V-*, 22 I.&N. Dec. 1306 (BIA 2000). The ability to raise a claim for relief from removal under the CAT was incorporated into U.S. domestic immigration law. *See* 8 U.S.C. § 1231 Note (2005), INA § 241 Note (2005); *See* Pub. L. No. 105-277, §2242. A CAT claim may be raised even after a final order of removal/deportation has been issued.

The advantage to CAT is that there are no bars to eligibility. Therefore, since the treaty itself does not contain any bars to its mandate of non-return, aggravated felons can make claims for relief if they fear torture. Additionally, an applicant is not required to establish his or her fear if torture is on account of race, religion, nationality, political opinion, or membership in a social group.

There are two separate types of protection under CAT. *See* 8 C.F.R. §208.16 - 17. The first type of protection is a form of withholding under CAT. Withholding under CAT prohibits the return of an individual to his or her home country. It can only be terminated

⁶ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* February 4, 1985, G.A. Res. 39/46, U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708(1984), reprinted in 23 I.L.M. 1027 (1984), modified in 24 I.L.M. 535 (1985).

if the individual's case is reopened and the DHS establishes that the individual is no longer likely to be tortured in his or her home country. The second type of protection is called deferral of removal under CAT.

Deferral of removal under CAT is a more temporary form of relief. Deferral of removal under CAT is appropriate for individuals who would likely be subject to torture, but who are ineligible for withholding of removal, such as persecutors, terrorists, and certain criminals. It is terminated more quickly and easily than withholding of removal if the individual is no longer likely to be tortured if forced to return to his or her home country. Additionally, if an individual were granted deferral of removal under CAT, the DHS would still be able to detain an individual already subject to detention.

Like withholding of removal, the benefits to CAT are limited. An individual who is successful under a CAT claim cannot be removed from the United States to the country from which he or she fled persecution, but can be removed to a third country if one is available. The individual may not adjust his or her status to legal permanent residency, but can obtain work authorization. Further, a person granted relief under CAT has no opportunity for family reunification or travel outside the United States.

Definition of Torture

Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind...when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in official capacity. CAT, Art. 1., 8 C.F.R. §208.18. The Board of Immigration Appeals interpreted the definition of torture as "an extreme form of cruel and inhuman punishment and [that] does not extend to lesser forms of cruel, inhuman, or degrading treatment or punishment." *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002). The Board also found that indefinite detention, without further proof of torture, does not constitute torture under this definition. *Id.*

The standard of proof under CAT is higher than the standard for asylum. Here, the alien must prove that it is "more likely than not" that he or she would be tortured if forced to return. *Matter of G-A-*, 23 I&N Dec. 366 (BIA 2002). The evidentiary proof for torture is very similar to the proof for asylum or withholding claims. All relevant considerations are to be taken into account. Including, where applicable, the existence in the state concerned of a "consistent pattern of gross, flagrant or mass violations of human rights."

Procedure for Raising CAT Claims

Individuals seeking relief under the CAT must bring their claim before an Immigration Judge. The procedure for filing a claim under the CAT will differ depending on certain factors, including the status of an individual's case. If your client is filing for asylum, he

or she would request relief under withholding of removal and CAT in his or her I-589 asylum application and should include the following information:

- The type of torture he or she is likely to experience if forced to return to his or her country;
- Any past instances of torture that he or she has experienced;
- Any past instances of torture experienced by close family members and associates; and
- Documentary support showing related human rights abuses by the government of his or her country, such as the U.S. State Department's Human Rights Country Reports, Amnesty International Reports, Human Rights Watch reports, and reports from other human rights monitoring groups.

If your client has already filed an I-589, but did not mention withholding of removal and CAT, she should supplement the application with the above information.

Remember that relief under the Convention Against Torture is not as beneficial as asylum. Thus, we recommend that you include a claim under the Convention in the alternative while seeking asylum. If you believe that your client has a potential CAT claim, please contact The Advocates for further information.

Voluntary Departure

Individuals who do not qualify for any of the aforementioned forms of relief may qualify for voluntary departure. INA § 240B. Voluntary departure permits an individual, who is otherwise removable, to depart from the U.S. at his or her own expense within a designated amount of time in order to avoid a final order of departure. However, voluntary departure is not available in all cases. INA §240B(c).

Voluntary departure may be preferable to a final removal order for a number of reasons. If an individual is issued a removal order he or she may be barred from reentering the U.S. for up to twenty years and may be subject to civil and criminal penalties if he or she enters without proper authorization. If the individual voluntarily departs within the time ordered by the court, he or she will not be barred for legally reentering in the future. In addition, an individual with a final removal order is barred from applying for ten years for cancellation of removal, adjustment of status and other immigration benefits.

It is important to exercise caution in agreeing to voluntary departure. If the individual fails to depart, he or she will be barred from applying for adjustment of status, cancellation of removal, voluntary departure, change of status and any other benefits for a period of ten years and can be subject to monetary fines up to \$5000.00. INA § 240B(d). In the past, voluntary departure was applied for in almost any case in which the applicant was eligible. However, now that appeals are longer and more protracted, voluntary departure may result in more harm to the client's options. While the voluntary departure period is automatically tolled during an appeal to the BIA, such is not the case at the federal court level. Unless a stay of the voluntary departure period is requested and

granted prior to the expiration of the period, the individual may be found to have overstayed the voluntary departure order while his or her appeal is pending before the circuit court.⁷ This results in an automatic order of removal from the U.S., a bar to most immigration benefits, and civil penalties (as described above). Particularly in cases where a client may be considering alternative immigration options, such as a petition by a spouse or family member, the penalties for overstaying the voluntary departure order will detrimentally affect his or her ability to acquire status through the other options. If you have any question about whether to request or accept voluntary departure, please talk with your consulting attorney and/or The Advocates' staff.

An individual may apply for voluntary departure either prior to the Master Calendar hearing or at the conclusion of proceedings, provided that the individual meets the necessary requirements.

Master Calendar Hearing: Withdrawing Asylum Application

If the application for voluntary departure is made prior to, or at the Master Calendar hearing, the individual must show that he or she:

1. Waives or withdraws all other requests for relief;
2. Concedes removability;
3. Waives appeal of all issues;
4. Has not been convicted of an aggravated felony and is not a security risk; and
5. Shows clear and convincing evidence that he or she intends and has the financial ability to depart

If the individual is able to meet these requirements, then the Immigration Judge may grant a voluntary departure period of up to 120 days at the time of the Master Calendar hearing. *See* INA §240 B (a), 8 C.F.R. §240.25. The Judge may not grant voluntary departure under 8 C.F.R. §240.26(b)(E)(ii) beyond 30 days after the Master Calendar at which the case is initially scheduled, except pursuant to a final stipulation.

Conclusion of Merits Hearing: In the Alternative to Removal Order

An individual may also apply for voluntary departure after the conclusion of proceedings, provided that the individual meets the following requirements:

1. Shows physical presence for one year prior to the date the Notice to Appear was issued;
2. Shows clear and convincing evidence that he or she intends and has the financial ability to depart;
3. Pays a bond of at least \$500 within 5 calendar days of the judge's decision;
4. Shows good moral character for five years prior to the application; and
5. Presents to the DHS a valid passport or other travel document sufficient to show lawful entry into his or her country, unless such document is already in

⁷ Please refer to additional guidance on this issue. The American Immigration Law Foundation (AILF) maintains a legal action center on their website and continually updates practice advisories on a variety of issues, including voluntary departure and the interplay with federal appeals. The website is: www.ailf.org.

the possession of the DHS or is not needed in order to return to his or her country. NOTE: Clients will be required to present a valid, unexpired passport and clear and convincing evidence of eligibility to enter a third country to qualify for voluntary departure.

If the client meets these requirements, the Immigration Judge may grant voluntary departure for a period of up to 60 days. *See* INA §240B(b); 8 C.F.R. §240.11(b).

Caution! If your client is granted voluntary departure in lieu of removal from the United States and appeals the Immigration Judge's denial of asylum, the voluntary departure period will be stayed until the Board of Immigration Appeals issues a decision. If your client petitions for review to a federal court, the voluntary departure period is not automatically stayed and could expire, affecting your client's ability to obtain other immigration benefits in the United States. Please discuss with your consulting attorney or The Advocates, if this is or may be your client's situation.

Temporary Protected Status

Temporary Protected Status (TPS) is available to individuals whose home countries have been designated by the Attorney General as unable to handle the return of their nationals. In order to receive TPS, an individual must prove he or she is a citizen or national of that country and that the person was in the United States on or before the date of the designation, and has been residing continuously in the United States since that time. Individuals with TPS are permitted to work in the United States and may not be deported during the period of protection. Those who qualify for TPS must register with the government every year in order to receive and maintain TPS status. The government can deny TPS status to anyone failing to register in a timely manner.

Asylum applicants who qualify for TPS should consider filing and maintaining TPS. There is no conflict between the two applications, and should asylum be denied, TPS would allow the individual to remain and work in the United States so long as TPS is designated for their country.

Temporary Protected Status is however, as the name indicates, temporary. The Attorney General designates the amount of time, usually 6 to 18 months, during which time individuals from particular countries will be afforded protection. The Attorney General may renew TPS designation for a particular country if he or she is convinced that unsafe conditions in the country persist. When the time comes that TPS is not renewed, the applicant may receive a Notice to Appear from the DHS and be placed in removal proceedings. The attorney and client must therefore weigh the risks and benefits to applying for TPS.

Because TPS is granted for short periods of time, you should consult Interpreter Releases or the USCIS web site at www.uscis.gov/graphics/services/tps_inter.htm to verify which countries are currently designated for TPS. As of April 15, 2008, the following countries are designated for TPS (for specific dates and eligibility requirements, please consult the USCIS website):

Burundi⁸ Honduras Nicaragua Sudan
El Salvador Liberia⁹ Somalia

If you have a client from any of the above named countries, check the USCIS website for eligibility requirements.

Applying for TPS or a Renewal of TPS

To file for TPS for the first time or for a renewal, Form 1-821 (Application for Temporary Protected Status) and Form 1-765 (Application for Employment Authorization) must be submitted. The 1-765 is used for information gathering purposes, and must accompany the TPS application, regardless of whether work authorization is actually sought. If work authorization is not sought, or if employment has already been authorized, no fee is required for the employment authorization form. If work authorization is sought, then the fee (or fee waiver request with affidavit in accordance with 8 C.F.R. §244.20) must be submitted with the I-765. Recently the instructions have changed regarding the submission of photographs and the addresses for TPS submissions. Please review the instructions on the USCIS website and form carefully if you are assisting a client with TPS as changes occur from year to year.¹⁰

“T” Visas for Victims of Trafficking

In October 2000, Congress signed into law the Victims of Trafficking Protection Act of 2000 (VTPA). This law created a new visa, the “T” visa, which intends to protect victims of “severe forms of trafficking.” This includes victims of sex trafficking, who were recruited, harbored or transported for the purpose of commercial sex acts such as prostitution. It may also include individuals who were recruited, harbored or transported for labor services, involuntary servitude, slavery or debt bondage through the use of force, fraud or coercion. To be eligible for a “T” visa the applicant must show the following:

1. The applicant is or has been a victim of a severe form of trafficking;
2. The applicant is present in the United States on account of such trafficking;
3. The applicant has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, or has not attained 18 years of age; and
4. The applicant would suffer extreme hardship involving unusual and severe harm if removed from the United States.

⁸ TPS for Burundi will end May 1, 2009.

⁹ Liberian Deferred Enforced Departure (DED) will terminate on March 31, 2009.

¹⁰ The Advocates is available to assist clients with the filing of their TPS applications, as are a number of free walk-in clinics. Please also note that someone who did not file when TPS was originally designated may still be qualify for a late filing exception. If you have questions, please contact the staff at The Advocates.

The VTPA provides for 5000 “T” visas to be awarded each year. The VTPA also provides that victims of trafficking who are detained should be housed in appropriate facilities, not in correctional facilities. It also mandates that DHS provide the necessary medical care and protection from the traffickers. Victims of severe forms of trafficking need not have obtained a “T” visa to be eligible for certain public benefits. However, the Office of Refugee Resettlement must certify them as “victims of a severe form of trafficking”. Please contact The Advocates if you believe your client is a victim of trafficking.

“U” Visas for Victims of Criminal Activity

The VTPA also created the “U” visa, for immigrant victims of certain criminal activity who assist law enforcement in the investigation or prosecution of the crime. Potential applicants must meet the following criteria:

1. Suffer substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity;
2. Be in possession of information about the criminal activity of which he or she was a victim;
3. Be of assistance to a Federal, State or local law enforcement agency or prosecutor or a Federal or State Judge or the Department of Homeland Security or other Federal, State or local authority investigating or prosecuting criminal activity; and
4. The criminal activity must have violated U.S. law or occurred in the U.S.

See INA § 101(a)(15)(U)(i). The particular crimes that qualify under the U visa regulations are listed at INA § 101(a)(15)(U)(iii). Please contact The Advocates if you believe your client is a victim of a crime and may qualify for a U visa; The Advocates is able to provide appropriate referrals.

THE ASYLUM PROCESS

The Application

The One Year Filing Deadline

All applicants must file their asylum applications within one year of entry into the United States. For those who entered prior to April 1, 1997, the deadline for applying was April 1, 1998. Applicants must prove by clear and convincing evidence that they are filing their asylum application within one year of their arrival in the United States or prove to the satisfaction of the asylum officer or immigration judge that the applicant qualifies for an exception. *See* 8 C.F.R. §208.4(a)(2)(A). Regulations provide that the one year deadline assessment should be made on a case by case basis by the immigration judge or the asylum officer. *See* 8 C.F.R. §208.4(a)(2) and (a)(5). The one-year deadline is generally inflexible, but some exceptions exist, as follows:

1. If there are “changed circumstances” – circumstances materially affecting the applicant’s eligibility for asylum, for example:
 - a. Changes in the applicant’s country; or
 - b. Changes in the applicant’s circumstances, i.e., conversion to another religion, or diagnosis of HIV.The applicant must file the application within a reasonable time after becoming aware of the change in circumstances – this time period is generally seen as a few months rather than a full year after the change.

2. If there are “extraordinary circumstances” beyond the applicant’s control, which kept the applicant from filing for asylum within a year of entry into the United States. The burden is on the applicant to prove extraordinary circumstances. The circumstances must be directly related to the applicant’s failure to file the application within one year. For example:
 - a. Serious illness;
 - b. A long period of mental or physical problems, including those due to violence the applicant or persecution suffered;
 - c. The applicant is under age 18 and living without parent or legal guardian; *Matter of Y-C-*, 23 I&N Dec. 286 (BIA 2002)
 - d. Ineffective assistance of counsel, i.e., the applicant had a lawyer but the lawyer did not provide notice of the one year deadline;
 - e. The application was filed within one year of arriving but was returned for some reason and promptly re-filed with filing defects corrected. *See* 8 C.F.R. §208.4(a)(4)(2003).

The applicant bears the burden of proof concerning his or her date of entry. Failure to provide evidence beyond the applicant’s testimony frequently results in a referral to an Immigration Judge or a denial.

Tip! There are a variety of ways to establish date of entry.

- If your client flew on a commercial airline, or traveled by Greyhound or other bus company, it may be possible to get a copy of the passenger manifest. The Immigration Court will issue a subpoena if needed.
- Ask your client if they kept any receipts or ticket stubs from their travel. One client had received a money wire while in Mexico City, for which he had kept the receipt that had his name, the date and the location of the Banamex office.
- They may also have photos from a country they traveled through.
- Additionally, affidavits from individuals who may have picked them up from the airport, let them stay in their home, or who they called upon arrival in the United States can help bolster weak evidence.
- Proof in the negative is also helpful – use documents, such as medical records, bills, court documents, or others to prove the client was outside the United States within a year of entry.

Calculating the One-year Deadline

For affirmative applications filed directly with USCIS, the date the application is received governs whether or not the application was timely filed within a year of entry. If an applicant entered the United States on June 12, 2005, his application should be received at USCIS on June 11, 2006 to be considered timely filed. However, if the applicant can show by clear and convincing evidence that he or she mailed the application within one year, the mailing date shall be considered the filing date. *See* 8 C.F.R. §208.4(a)(2)(ii) (2003). The one year filing-period does not include the day of the alien's arrival, i.e., the first day of the one-year filing-period was April 10, 2001 and the last day was April 9, 2002 if the alien arrived in the United States on April 9, 2001. *Minasyan v. Mukasey*, 553 F. 3d 1224 (9th Cir. 2009)

For applications filed with the Immigration Court, the day the application is received in court will be considered the filing date. Applications filed directly with the court must be filed in person. If an asylum applicant is scheduled for an initial hearing that falls after the one-year deadline, it is the applicant's responsibility to file a motion for expedited hearing with the court and to have a prepared application for asylum ready for filing at that time.

Preparing the Asylum Application

The asylum application must be filed on **Form 1-589, Application for Asylum.**¹¹ Careful, complete and accurate preparation of the Application for Asylum is essential to establishing your client's credibility and his or her claim to asylum. Similarly, thorough preparation of the client for the interview or hearing will be required. Finally, identifying persuasive corroborative evidence, including witnesses, documents, and human rights reports, will be key to the success of the case.¹²

Begin preparation by reading background material on the recent history of the applicant's country. You will save yourself a lot of time and minimize the chances of confusion or error by having a basic understanding of the political and military conflicts in your client's country before beginning application preparation.

Interviewing the Client

Plan to meet with your client frequently and regularly. Do not underestimate the amount of time necessary to fully understand your client's history. The time spent preparing the application and for the interview or hearing is the single most critical element in preparation of the case. Essential information about the applicant's story may emerge only over time, as the applicant and attorney build trust together. Errors or omissions from the asylum application or initial affidavit may be held against your client by the

¹¹ The form is available at www.uscis.gov. USCIS does periodically update forms, so always download the most recent version from the website.

¹² You may wish to have your client sign a blanket release of records form, including one to the United Nations High Commissioner for Refugees (UNHCR) so that you can release your client's records to the UNHCR for an advisory opinion. We do not routinely do this, however it may be useful. Contact your consulting attorney regarding whether this is a good course of action in your case.

adjudicator, who may find later corrections to the story to be an indicator of lack of client credibility.¹³

Interviewing asylum applicants is challenging. Cultural norms, language differences, educational background, and lack of familiarity with the U.S. legal system may all complicate the process.

Many clients suffer from Post-Traumatic Stress Disorder or other physical and psychological problems that make it difficult for them to fully tell their story to anyone. For these reasons, a different style of interviewing than usual may be necessary when interviewing clients in asylum cases. Lawyers in this country often have a style of interviewing that can be threatening to The Advocates' clients. An intense, rapid-fire approach, bearing down hard on minor inconsistencies, may be very frightening to clients seeking asylum. As a result, a more gentle approach may be required. Remember, over fifty percent of The Advocates' clients were previously tortured and persecuted in their home country. We encourage clients to contact us with concerns, and would urge you to do the same if you are having difficulty with your client.

Establishing Trust with Your Client

Establishing trust with your client is essential in his or her asylum case. The great majority of The Advocates' clients come from countries whose legal systems are corrupt and inept. They may be unfamiliar and suspicious of the legal proceedings that they find themselves in. This suspicion makes it difficult for asylum seekers to trust their attorneys, let alone the judge rendering a decision in their case. Part of your job is attempting to overcome this built-in distrust. The Advocates provides a general explanation about the attorney-client relationship and the U.S. legal system to all of its clients; however some additional explanation may be needed during the course of representation. Particular areas we address include: confidentiality, importance of honesty, necessity of reviewing documents before signing, and the length of time necessary to thoroughly prepare documents.

The Advocates' recommends initially you begin by helping the client relax and trust you. We often take time to explain things thoroughly and urge the client to ask questions. It may be helpful in establishing trust with the client for you to let the client know something about yourself. Sometimes the best way to begin a relationship with an asylum client is to offer coffee/tea or refreshments and simply sit and chat for a few minutes. Remember that as human beings, you have many mutual interests in common – family, friends, etc.

Overcoming Cultural Barriers

¹³ The **REAL ID Act** modified INA § 208(b)(1)(B)(iii) to read the adjudicator may take into account “any inaccuracies or falsehoods in such statements, *without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim.*” A negative credibility determination should not be based wholly on inconsistencies, inaccuracies or falsehoods of immaterial facts, but the inconsistencies may be considered as part of the totality of the circumstances.

Cultural differences may also create challenges in the process of cases preparation. For example, some of The Advocates' clients are from very rural areas, many are poor, and have limited education. Clients frequently come from cultural settings in which calendars or clocks may have little value and may not be able to remember what month an event happened - - or even what year. Since such gaps can create serious credibility problems, you may have to be creative about establishing a foundation for specific testimony. For example, occurrences may need to be tied to seasons, rather than dates, or to other events that the client can relate to the occurrence.

Take care when questioning the client about family relationships. Do not assume that terms such as father, sister, or child have the same meaning as in American English. Encourage the client to draw a family tree to illustrate complex relationships. Remember that the definition of "child" under U.S. immigration law includes biological children, adopted children, and step-children. Explain these terms fully, and take care to clarify with the client whether each child is biological, adopted, or a step-child, as misunderstanding may result in a negative credibility finding or in the denial of later applications for family reunification.

Another barrier may be the client's natural reticence about answering questions fully and honestly. Often, a client's only experiences in dealing with well-dressed interrogators sitting behind desks in business offices have been unpleasant and threatening. They may withhold information at first or may modify their story, or concoct one completely, based on their assumptions about what you want or expect to hear. With patient interviewing and a careful building of trust, a quite different, and much more credible story may emerge.

Tip! Clients often receive information and advice from members of their community which they may trust more than your advice. Additionally, they may hear about someone's case that is "just like theirs" but which is moving faster or slower and this often causes anxiety. As we do with our own clients, The Advocates urges you to address client concerns such as these and always emphasize the importance of telling the truth, and the inherent difference in each individual's case.

Dealing with Psychological Barriers

Finally, a more difficult and surprisingly prevalent problem may be the presence of psychological barriers, which make case preparation and presentation difficult. A substantial percentage of The Advocates' clients have been found to be suffering from Post Traumatic Stress Disorder (PTSD) or other psychiatric disturbances, as a result of what they have witnessed or suffered in their home country.

From the lawyer's point of view, these problems may manifest themselves in a variety of ways. For example:

- The client may simply block out an entire traumatic event, or significant parts of one. The client may have witnessed or endured something that would clearly

- make him or her eligible for asylum but may be unable to testify about it in any credible fashion, or even remember it at all;
- The client may be able to remember traumatic events and describe them to the attorney, but may find the experience so distasteful that he or she simply does not show up at the next appointment or resists efforts to go over the story again.
 - The client may display inappropriate behavior or affect while talking about things that happened to him or her. The most obvious and best-known example is the tendency of many people to relate horrifying events in a flat, seemingly emotionless voice; or
 - The client may be suffering from other problems, such as depression or substance abuse, related to or stemming from PTSD or other psychological condition.

If you believe your client would benefit from the services of the Center for Victims of Torture, refer the client directly to CVT. Many of The Advocates' clients are already clients of CVT when you receive the case. We advise having your client sign a release so that you can speak with their therapist and/or social worker about these issues. As with The Advocates, not every person who seeks services can be served at CVT; some clients may not qualify for services. The Center for Victims of Torture is located at 717 East River Road; Minneapolis, MN 55455; (612) 436-4800; fax (612) 436-2600; www.cvt.org.

Interviewing Through an Interpreter

Interviewing a client through an interpreter is slow and time-consuming. Some standard legal expressions do not translate well into another language and some forms of expressions or questions may be misunderstood. Avoid using legal terms where possible. In addition, interpreters are likely to come from different countries than The Advocates' clients and differences in dialect or use of certain word can be very critical. Be sure that both the interpreter and the client understand the confidential nature of these interviews. The use of a confidentiality agreement for outside interpreters is recommended.

Use of a professional, paid interpreter generally is not necessary. The Advocates maintains a pool of volunteer interpreters in a variety of languages and volunteers having difficulty locating an interpreter or in need of translations are encouraged to contact The Advocates.¹⁴ It is recommended that attorneys not rely on a single interpreter through the process, but rather that at least two different interpreters work with the client prior to filing or prior to the trial to ensure the translations have been accurate.

Practice Pointers for Completing the Asylum Application

Accurate preparation of the asylum application is essential to a grant of asylum. Take care when completing the application to explain each question thoroughly to the applicant and to review the application completely with the applicant prior to signing and filing. Explain the nature and purpose of the form, including the significance of signing the form

¹⁴ Please be aware that as our interpreters are entirely volunteers, it is not always possible to get an interpreter or translation done on short notice. When possible, we appreciate a few days advance notice.

and affirming it accurately. Some clients are reluctant to question the attorney or to point out errors made in preparation of the form. Take care to ensure that the applicant understands that he or she is responsible for the contents of the form and that it is their responsibility to bring any errors or omissions to the attorney's attention.

Complete every question. Write "none" or "unknown" as appropriate.

Part A.I – Information About You:

- Name: Print the applicant's last name in CAPITALS
- List all aliases, including names used on false documents and maiden names
- List each entry the applicant has made to the United States in his or her lifetime. Review the passport for accurate information if available.

Part A.II – Information About Spouse & Children:

- Marital Status: Supplemental explanation may be required for customary or traditional marriages without marriage certificates. If your client refers to a "fiancée," "boyfriend," or "girlfriend," inquire further about the extent of the relationship. If the client claims a "husband" or "wife," similarly inquire as to whether the relationship was formal and legally recognized or a more informal relationship. Some traditional marriages may be recognized by the U.S. even if there is no marriage certificate, so it is prudent to err on the side of listing the spouse and providing an explanation.
- List all children of the applicant, whether inside or outside the U.S., living or dead, biologically-related or related by marriage or adoption. Explain relationships as needed. **If children are not listed on the I-589 it may be very difficult to later bring them to the U.S.**

Note: It is very important to have a clear discussion with your client about their familial relationships. There are many cultural differences that may complicate your conversation and the definitions of "family." Establish a clear understanding so you and your client are working from the same meaning of "child" and "spouse." Additionally, sometimes family members may be missing and an asylum applicant may therefore not "count" the person – we encourage clients to list all family members even if their whereabouts are unknown as these people may turn up much later.

Children: Spend time finding out if the children are biological or not; if not, inquire about the "adoption" of the child. Many clients have informally adopted relatives' children or other children due to the situation in their country, death of a relative, or simply the fact that the client was wealthier and better able to provide. While all "children" should be listed on the I-589, it is important to temper the client's expectations about family reunification early by explaining the definition of child under U.S. law.

Spouse: Your client may have had a traditional marriage, but not a formal one that carries a marriage certificate. Some clients believe they cannot even list their spouse if they do not have a marriage certificate; this is not true. While the lack

of a marriage certificate makes family reunification more challenging, it is vital to list the spouse on the application to preserve the chance of reunification. Additionally, clarify marriages and divorces with your client if there appear to be multiple spouses. Some clients come from countries where polygamy is practiced. It is important to clarify when one marriage ended (or if it ended) and when another began. This is also important later when determining family reunification.

Part A.III – Information About Your Background

- Addresses: List your client’s address immediately prior to coming to the United States as well as his or her last address in the country where he or she fears persecution.
- Employment: List all employment, both lawful and unlawful.

Tip! If the client is in removal proceedings, he or she will also have to file a Form G-325A which includes addresses and employment for the past five years – make certain the G-325A and the I-589 are consistent in this regard.

- Family: List all parents and siblings of the applicant, living or dead biologically related or related by marriage or adoption. Explain relationships as needed. *If family members are not listed on the I-589, it may be very difficult to later bring them to the United States.* It is common practice for DHS to refer to previously-filed asylum applications of siblings, parents, or children who are listed on the application for asylum. Obtain copies of the applications and A-files of all relatives if possible prior to filing your client’s application.

Part B – Information About Your Application

Answer each question in the space provided on the form. Usually you will want to provide more explanation than there is space. It is considered good practice to provide a summary or introductory answer in the blank on the form and then state “see attached affidavit” or continuation page. Provide a detailed, chronological affidavit of your client to supplement and clarify the answers to the questions. *Be careful not to use excessive detail that could possibly be used against your client later if they are not especially detailed, or tend to forget such details.*

- Question 1 – Why are you seeking asylum? Check all appropriate boxes.
- Question 1.A – Mistreatment or threats? Have you, your family, close friends or colleagues ever experienced mistreatment or threats by anyone? Past persecution creates a presumption of a well-founded fear of future persecution. Discuss past harm or mistreatment thoroughly, including psychological harm and threats. Specify the identity of the persecutor.
- Question 1.B-Future Fear? Do you fear harm or mistreatment if you return to your home country? Discuss the basis of the fear, any past persecution, and reasons for fearing persecution in the future. When possible, draw connections to the past harm stated in Question 1A.
- Question 2-Accusations, Charges, Arrests...? Make sure you and your client are using the same definition of “arrest” Clients living in repressive states often

- consider police stops or brief detentions to be “routine” and not worthy of discussion because of their frequency or in comparison to longer imprisonment.
- Question 3A- Membership in Organizations or Groups? List your client’s memberships first. Include information about spouse, children, parents, siblings, and other relatives. The organization or group need not be a formal, established political party or religion – include membership in ethnic groups, clans, family groups, trade unions, cultural groups and the like. Make sure that any group linked the client’s persecution is listed here.
 - Question 3B - Continued Participation? Explain any continued participation, no matter how minor.
 - Question 4 - Torture? The definition of “Torture” is “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.”

Part C – Additional Information

- Question 1 – Previous refugee status, asylum applications or grants or withholding? Changed country conditions may allow a grant of asylum even if a previous application has been denied.
- Question 2 - Travel through other countries. If your client was ‘firmly resettled’ in a third country, he or she is not eligible for asylum in the United States. “Firm resettlement” generally requires *permanent* status in the third country. Explore with your client the circumstances of any residence in a third country. Make sure to list any country the client transited through even if it was just a change of planes in Amsterdam.
- Question 3 – Former persecutors are ineligible for asylum. If your client was a member of the police, military, or security services, be certain to obtain specific information about their duties before filing the asylum application.
- Question 4 – Return to home country. If the applicant has returned to his or her home country, he or she must explain in detail why he or she returned and what happened during that time. If the applicant was willing to return to his or her home country before, she must explain in detail why she is no longer willing to return
- Question 5 – One-Year Deadline. Applications filed more than one year after the date of entry into the U.S. may be denied unless the applicant qualifies for one of the limited exceptions to the filing deadline. *Provide affirmative evidence of your client’s entry date!* Passport stamps, airline tickets, affidavits from witnesses may all be used to carry the applicant’s burden to proving by clear and convincing evidence that the application is timely filed.
- Question 6 – Criminal activity within the United States. Note that the question asks about all crimes and charges – including crimes of which the applicant was never convicted, and that were ultimately dropped.

Affidavit

A detailed affidavit providing a chronological narrative of your client’s claim is essential to accurately present the claim to the adjudicator. The affidavit should be prepared

carefully with special attention paid to ensure that the affidavit and the Application for Asylum are consistent with one another and with all supporting evidence. Preparation of the affidavit, with its narrative form, often reveals gaps in your client's story or other inconsistencies that need to be explored prior to submission of the claim.

Take time to compare carefully your client's affidavit against the answers on the Application for Asylum, the passport, and objective sources of information, such as human rights reports discussing major events in your client's country. Identify any inconsistencies and resolve them with your client prior to submission of the application and affidavit.

Corroborative Evidence

For asylum applications filed prior to May 11, 2005 the applicant must present all reasonably available corroborative evidence in support of the application for asylum. Failure to either present such evidence or to provide a sufficient explanation for its absence may result in a negative credibility finding and denial of the application. See *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998); *Matter of M-D-*, 21 I&N Dec. 1180 (BIA 1998); *Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998); *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998); and *Matter of A-E-M-*, 21 I&N Dec. 1157 (BIA 1998). However, the REAL ID Act modified the corroborative evidence standard required of asylum applicants. INA § 208(b)(1)(B)(ii) now reads “[w]here the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.” Previous case law required adjudicators to act reasonably in requesting additional corroboration and to also provide reasons for the request.¹⁵ There is no such language contained in the **REAL ID Act** as it does not specifically state adjudicators should use a standard of reasonableness when determining whether corroboration is necessary or whether the corroboration provided is sufficient. Thorough documentation is therefore essential.

Attorneys are cautioned to carefully examine all documents offered by the client and discuss with the client the consequences of submitting any fraudulent document to the Asylum Office or the Immigration Judge. A single fraudulent document may result in a negative credibility finding and denial of the claim. Original documents are routinely submitted to the federal Forensic Documents Laboratory in Virginia for testing and comparison to exemplars. The DHS Office of Chief Counsel routinely sends documents overseas for consular investigation as well. Submission of documents to independent forensic examination may be possible when an FDL report indicates a fraudulent document. However, this problem is best avoided by keeping the document out of the record in the first place. Clients who are unsure of the origin or authenticity of a document must weigh the consequences of failing to file a material document against the consequences of filing a fraudulent document.

¹⁵ See *Secaida-Rosales v. INS*, 331 F.3d 297, 331 (2d Cir. 2003). See also *Qui v. Ashcroft*, 329 F.3d 140, 153-54 (2d Cir. 2003).

Personal Documentation

The applicant must provide proof of identity, nationality, and other proof that they fall within the protected class(es) upon which the claim for asylum is based. When filing the asylum application, or submitting supplemental documentation, submit copies of any original documents (not the originals) and bring the originals to the asylum interview for examination by the officer. The asylum application requires a complete copy of the passport in triplicate at the time the application is filed. Most passports are written in English as well as the native language – if this is not the case, include a translation of the passport. Documents you should consider submitting to prove identity, nationality and claim include:

- Passport
- Birth and marriage certificates (for the primary applicant)
- Birth certificates for children included on the application
- School records
- Professional/employment records
- Political party membership cards
- Affidavits from political party
- Photographs
- Medical records

Any documents that are not in English must be translated and accompanied by a notarized Certificate of Accuracy of Translation that attests to the translator's competency in the languages. The Advocates maintains a roster of volunteer interpreters who can assist with the translation of documents. Please contact our office if you need assistance with document translation.

Please refer to 8 C.F.R. § 287.6 for guidance on situations where proof of official records, foreign and domestic, is required.

Material Witnesses

Witnesses to particular events material to the applicant's claim may provide affidavits of their knowledge of events. Witnesses need not be in the United States. Letters and emails may be submitted, although the adjudicator may give less weight to unsworn statements. Encourage your client to keep the envelopes in which letters were received or obtain affidavits from a person hand-carrying letters from the home country. These should also be submitted as proof. When possible, encourage the client to have the affiant make a sworn, notarized statement or at the least include their complete name and address, along with the date, on any letter or e-mail.

Take particular care when preparing affidavits in support of the application. Although live witness testimony is rarely permitted at the Asylum Office interview, affidavits submitted to the Asylum Office will be included in the record of proceedings if the case is referred to the Immigration Judge. If the case is referred, the affiants should be available for additional testimony and cross-examination.

Often material witnesses are not citizens of the United States. *Keep in mind that your witness's immigration record may become an issue in your client's trial and could reflect on the client's credibility.* If the witness has any questions about the implications of testifying on their own immigration status, advise them to seek competent immigration counsel. This may be particularly important if the witness is also a family member of your client. Often family members' immigration files are pulled for comparison with your client's story, whether or not they act as a witness. If you have any reason to suspect a problem or inconsistency, make a FOIA request to review the file of the relative and also advise the family member to seek independent counsel. Contact The Advocates for referral to private counsel or free legal services if necessary.

Country Conditions Documentation

In addition to evidence supporting the specifics of his or her claim, your client must present objective evidence relating to the situation in his or her home country to corroborate the claim. Evidence of this type should be sufficient to support a finding that the claim for asylum is objectively reasonable. Independent, objective reports of country conditions help your client meet this burden. Credible human rights reports, such as those issued by the U.S. Department of State, the U.S. Commission on International Religious Freedom, Amnesty International, the U.K. Home Office Directorate as well as news accounts from respected organizations provide valuable information about the country. In particular, look to reports or articles that provide specific corroboration of your client's situation. Examples include: a report which corroborates and describes a rally that your client attended; statements about prison conditions which substantiate your client's experience; explanation of the treatment of a certain minority group which supports your client's claim of discrimination and mistreatment.

Expert Witnesses

Expert witness testimony can be extremely persuasive to the adjudicator. In many cases, an affidavit from an expert is sufficient. Affidavits may be submitted to the Asylum Office, where in person expert testimony is generally not permitted. At the Immigration Court, an affidavit may also be submitted although in person testimony is generally preferred. The Bloomington Immigration Court will entertain written motions for telephonic expert testimony submitted in advance of the hearing (usually a minimum of 10 days in advance).¹⁶

Expert testimony may be provided regarding country conditions. University faculties and authors of human rights reports may be available to provide an expert opinion in the case. Expert testimony may also be provided to establish your client's medical and psychological condition. This may be useful as evidence of past persecution or torture if

¹⁶ As stated in the Local Operating Procedures for the Bloomington Immigration Court, telephonic witnesses are generally disfavored. However, a request may be made by written motion no later than 10 days before the hearing date. The motion should explain why the witness cannot appear in person, identify the location from which he or she will testify and include a copy of the witness' identification.

your client suffers from symptoms commonly the result of such treatment, such as depression or post-traumatic stress disorder, or if your client has physical scars or other injuries. It may also be useful to establish that your client suffers from memory or other problems which may affect the adjudicator's credibility finding. If your client is also receiving treatment from the Center for Victims of Torture, the treating psychologist and medical doctor commonly prepare documentation of the client's condition.

Minnesota Asylum Network

Together with CVT and Physicians for Human Rights, The Advocates maintains a trained panel of volunteer health care professionals who may be available to provide expert assessment and testimony. Contact The Advocates for additional information about the types of assessments commonly done and for a referral to the panel.

Fingerprints & Biometrics

The process for fingerprints will differ depending on whether an individual is filing for asylum affirmatively or defensively.

Affirmative

If an individual is filing affirmatively, upon submission of the I-589, the applicant will receive a fingerprint notice by mail, with instructions as to a date and time to appear to have his or her fingerprints taken at a particular Application Support Center (ASC).¹⁷ After the fingerprints are taken, the DHS will then send the fingerprints to the FBI in order to obtain the applicant's record. The applicant should take a photo ID with him or her to the fingerprinting appointment, if the individual has an ID.

Defensive

If the individual is filing for asylum while in removal proceedings (defensively), or has a referred asylum application, he or she will receive a biometrics instructions sheet at the Master Calendar hearing. The applicant must send the following to the USCIS Nebraska Service Center:

1. Copy of the first three pages of asylum application, with current address & A number noted;
2. Copy of EOIR-28 if the applicant is represented;
3. Copy of the instructions.

Upon receiving these documents, the Nebraska Service Center will issue a biometrics appointment notice to the applicant with a date & time to appear at the Application Support Center for printing. The applicant must appear for fingerprinting as scheduled. Note that fingerprint checks are valid only for 15 months and the Immigration Judge cannot grant asylum unless all checks have cleared. If you have concerns that your

¹⁷ In Minnesota, the Application Support Center is located in the midway area on University Avenue in Saint Paul.

client's checks are out of date, contact the Office of Chief Counsel to inquire and if necessary, get a new appointment notice.

Affirmative Asylum Application Process

Submission Checklist

When filing the I-589, you should submit the original plus two copies of the following materials:

- **G-28, Notice of Entry of Appearance.** The G-28 must be signed by the client and attorney. It should also be printed on light blue paper.
- **Two Photos** of the applicant (and all dependents included in the application). Photos must be passport size and style, printed on photo paper, color with a white background.¹⁸
- **Form I-589**, Application for Asylum signed by the client and attorney.
- **Affidavit** of client.
- **Exhibit List** (with short summary of each exhibit) and **exhibits**. Exhibits must be two-hole punched, paginated, and include a table of contents. Exhibits should include:
 - Copy of passport, cover to cover, if available;
 - Copy of I-94 card, if legally admitted;
 - Personal documentation with translations and certificates of accuracy if necessary;
 - Affidavits of witnesses;
 - Affidavits of expert witnesses
 - Country conditions documentation (highlighting relevant portions);
- ***Optional* Legal brief** addressing any complex or novel legal issues specifically, and addressing the applicant's eligibility for asylum.¹⁹

If there are additional family members included on the application who are residing in the United States, send additional copies of the first three pages of the I-589 for each family member. Please refer to the instructions on the Form I-589 for specific requirements, as the forms and instructions do change regularly.

Filing Address:

Send completed asylum application package to:

Department of Homeland Security
Citizenship & Immigration Service

¹⁸ For instructions about photo specifications, please see the following web link for a USCIS flyer: http://www.uscis.gov/graphics/publicaffairs/newsrels/04_08_02Photo_flyer.pdf.

¹⁹ A legal brief is generally submitted only where the claim is based on a unique social group or where other unusual legal issues exist – not in every asylum case.

Nebraska Service Center
PO Box 87589
Lincoln, NE 68501-7589

If using a commercial delivery service, including Federal Express, send to:

Department of Homeland Security
Citizenship & Immigration Service
Nebraska Service Center
850 S Street
Lincoln, NE 68508

Obtain proof of delivery from the Post Office or other delivery service and retain as proof of timely filing.

Receipts

The applicant and attorney of record will receive an Acknowledgement of Receipt from the Chicago Asylum Office after filing of the application. Allow several weeks for the receipt to be generated. If the Acknowledgement of Receipt is not received, contact the Chicago Asylum Office to confirm receipt and obtain a new Acknowledgement of Receipt. This receipt essentially serves as the applicant's proof that he or she has a pending asylum application and is therefore allowed to remain in the United States.

If the asylum application is still pending 150 days after the application was received, the applicant is eligible to file for a work permit. You can prepare and file Form I-765, Application for Employment Authorization (detailed in a later section) and the client should receive an Employment Authorization Document within 30 days. If the work permit is not received after 30 days, the applicant may be able to obtain a temporary work permit from the local USCIS office.

The Asylum Interview

Officers from the Chicago Asylum Office periodically travel to Minnesota to conduct asylum interviews. Interviews are held at the USCIS District Office at 2901 Metro Drive, Bloomington, Minnesota. Notice of interview is generally sent to both the attorney and the client three weeks prior to the scheduled interview. **Continuances are not routinely granted for attorney conflicts**; if a volunteer receives notice of interview and cannot attend, please notify The Advocates immediately to arrange for substitute counsel at the interview.

The Chicago Asylum Office's schedule of interviews in Minnesota varies, depending on the availability of officers to travel. In general, the Asylum Office conducts interviews for two to four weeks each year. Applicants whose cases are pending less than 60 days are scheduled for interview during these weeks, allowing the Asylum Office to meet the regulatory processing timeframe. Applicants whose cases have been pending longer are

scheduled for interview through a random scheduling program. If your client has been waiting for an interview and wishes to be interviewed, you may contact the Chicago Asylum Office to request that the client be placed on the next interview schedule. Attorneys should note that employment authorization eligibility hinges on the length of time the asylum application has been pending: clients with cases pending more than 180 days are eligible to receive work authorization.

Persons entering the USCIS office are searched, and only those appearing for scheduled appointments will be admitted to the building. Bring a copy of the interview notice, and provide a copy to the interpreter and client if they are meeting you at the USCIS office. Indicate to the security guards that you are appearing for an asylum interview. You will be directed up one flight of stairs, to a waiting room on the third floor designated for asylum applicants. Place a copy of the interview notice in the basket provided near the door. An asylum officer will call your client when ready.

The attorney should prepare the applicant for the interview and accompany the client to the interview. Attorneys, however, have very limited roles in the non-adversarial setting of the interview. The Asylum Officer will question the client regarding the veracity of the contents of the application and his or her claim for asylum. At the end of the interview, the attorney will be allowed to present a short closing argument on behalf of his or her client.

If the client is not fluent in English, he or she must bring her own interpreter. The Asylum Office will not provide an interpreter.²⁰ The applicant's attorney may not serve as the interpreter. In addition, it is strongly suggested that family members do not serve as interpreters during these interviews. It is critical that a competent interpreter accompany your client to the interview. While a professional interpreter is not necessary, it is imperative that you work with the interpreter and the client prior to the interview to ensure that the interpretation will be accurate.

The interview is relatively informal, taking place across a desk. After introductions, the applicant will be electronically fingerprinted and photographed. The client will take an oath, and then a form memorializing the oath will be presented to the client to sign. While the proceedings are non-adversarial, they are under oath and your client's credibility will be scrutinized. Discuss with your client prior to the interview the significance of the oath, including information about the crime of perjury and the possibility of termination of asylum should fraud be detected at a later time.

If family members are included in the application and present in the United States, they will also be appearing at the interview. The interview however will focus on the primary

²⁰ The Asylum Office is the process of switching to a system where they will provide the interpreter for your client. At this time, we understand that some interviews have been monitored by a telephonic interpreter who only participates if errors are made by the client's interpreter. There are some concerns about this system. For the time being, provide your own interpreter. The Advocates will provide updates via Probono.net when this changes.

applicant, and the other family members may be asked to wait outside and only briefly be questioned.

Normally, the Asylum Officer first tries to make the applicant feel comfortable and assures the applicant that information obtained during the interview will not be shared with the applicant's government. The officer reviews the asylum application with the applicant to ensure that all the information is correct and accurate. If any information on the application requires changes or updates, the attorney should raise the changes before the asylum officer begins the review process. The Asylum Officer will mark all changes in red pen, and these will be reviewed with the client and attorney at the close of the interview. If major changes are necessary, it is usually best to provide written corrections to ensure the record is complete.

Cautionary Note: Contact The Advocates or your consulting attorney should major changes be made to the substance of your client's claim. An adverse credibility finding may be entered if the client's testimony differs from their written claim or if the information on the form initially filed differs substantially from that offered in the written corrections without explanation.

Banat v. Holder, U.S. App. LEXIS 4817 (8th Cir. 2009) (The alien's due process rights were violated when the IJ made his adverse credibility determination relying on the State Department letter, which was unreliable because it did not provide sufficient information about how the investigation was conducted.)

Additional documentation may be presented at the time of the asylum interview. Bring two complete copies of the additional documentation, indexed, paginated, and with a table of contents, to the interview. The Asylum Officer may ask you to forward voluminous documentation by mail to Chicago following the interview.

The Asylum Officer will ask the client questions which most often will come directly from the client's affidavit regarding the client's experiences and the reasons he or she fears returning to his or her country. Sometimes the questions are open-ended, such as: "Why are you afraid to return to Kenya?" Other times, the questions are specific; "What happened to you on October 6, 1999?" Asylum interviews typically last between 1 ½ to 2 ½ hours. It is advisable to conduct a mock interview prior to the asylum interview to prepare your client. Make sure your client is able to briefly summarize the essential reasons he or she is seeking asylum and understands the most important information in the claim that needs to be covered.

The role of the attorney during the asylum interview is very limited. The attorney may interrupt the interview if he or she feels that the applicant did not understand the question or if a question is inappropriate. The attorney should ask to stop the interview and speak to a supervisor if the interviewing officer's behavior is inappropriate or offensive. At the end of the interview, the attorney will be asked to make a short closing statement on behalf of the applicant. During the closing statement, it is important that the attorney explain to the asylum officer why the client is eligible for asylum and which enumerated

grounds are applicable to the client's claim. It is important for the attorney to direct the Asylum Officer to any document that is particularly supportive of the applicant's case or that the attorney believes should be given particular attention. The regulations permit the Asylum Officer, in her discretion, to receive additional documentation after the interview, 8. C.F.R. §208.9; discuss this with the Asylum Officer at the close of the interview should you feel additional documentation of a particular issue is required. If your client has not accrued the 180 days necessary to be eligible for employment authorization, please note that requesting additional time for documentation will stop that time from accruing. The need for additional documentation should be balanced with the stopping of the clock.

Outcome of the Interview

The Asylum Office will mail a written notice of decision to the client and the attorney. There is no specific time frame in which the application must be adjudicated. There are a number of possible outcomes:

- **Recommended Approval** means the case is approved on its merits, but the background checks (fingerprints, name checks) have not yet cleared. The case is approved pending the favorable outcome of those checks. A client with recommended approval is NOT an asylee, but can apply for a work permit if he or she does not yet have one.
- **Approval** means asylum has been granted. The letter stating the case is approved includes specific instructions regarding family reunification, permanent residence, the I-94 card, social security and certain grant programs available. Review this with your client to ensure he or she understands the benefits. The Advocates is also available to meet with you and your client after asylum is granted to review the benefits and responsibilities.
- **Referral Notice** means the Asylum Office has referred the case to the Immigration Judge, initiating removal proceedings. Cases are referred if the Asylum Office does not approve the application and the applicant is not in valid immigration status.
- **Denial** means the application has been denied but because the applicant is in a valid immigration status they are not subject to removal proceedings and therefore cannot be referred. Denied applicants retain their other valid immigration status. The case is concluded at this point.

Removal Proceedings

Removal proceedings are initiated by the filing with the Immigration Court of Form I-862, Notice to Appear (NTA), charging the client with removability from the United States. The client is the respondent in the case. The DHS bears the burden of establishing removability from the United States. In asylum cases, this usually involves establishing that the individual is a not a citizen or national of the United States; is a

citizen or national of another country, and that he or she is in the United States in violation of at least one provision of the Immigration and Nationality Act. This violation is typically remaining in the United States after the expiration of the period of authorized stay. Once removability has been established, the alien must state any claim for relief from removal, such as a claim for asylum.

Removal proceedings must be closely monitored. A missed court date will result in an *in absentia* order of removal. Make sure that your client's correct address (as well as your own) is on file with both USCIS and the Immigration Court. Monitor case status by calling the EOIR information line at 1-800-898-7180 with your client's A-Number (Alien Registration Number).

Removal proceedings begin with the **Master Calendar** hearing. The Master Calendar hearing is similar to a criminal arraignment at which pleadings are taken and other preliminary matters or status checks are conducted. At the Master Calendar hearing, a date is set for the Individual hearing when the merits of the case are adjudicated. Individual hearings are generally scheduled for 3-4 hours, at which testimony is taken, evidence presented, and a decision rendered by the Immigrated Judge.

Attorneys representing clients in removal proceedings should refer to and follow the local Operating Procedures for the Bloomington Immigration Court. Procedures are available at www.usdoj.gov/eoir. The Immigration Court has issued a new practice manual, which applies to all Courts nationwide, effective July 1, 2008. At that time, the local rules will be superseded by the practice manual.

Referred Applications

As state above, applications not approved by the Asylum Office are **referred** to the Immigration Judge. Referral of the application transfers jurisdiction from the Department of Homeland Security to the Immigration Court, a component of the Department of Justice's Executive Office for Immigration Review (EOIR). Applicants referred from the Asylum Office are in removal proceedings.

The Immigration Court receives from the Asylum Office a complete copy of the I-589, Application for Asylum, plus attachments. Unfortunately the Asylum Office does not always forward all attachments you submitted. It is important to check with the Judge to see how many pages are contained in the referred application he or she received from the Asylum Office and what documents are included if it appears to be incomplete. *A new asylum application need not be filed with the Immigration Court.* Updates of or corrections to the previously filed application may be made, and additional documentation may be submitted to the Court. The asylum application, however, remains "pending" and processing time for purposes of employment authorization continues to accrue after the case is referred to the Immigration Court.²¹

²¹ The Immigration Judge may refer to the "clock." This tracks the number of days the I-589 has been pending and determines eligibility for work authorization. The "clock" can be stopped if the respondent delays proceedings by requesting a continuance. It is important to avoid the "clock" being stopped in a

Upon referral to the Immigration Court, a Notice of Hearing will be sent to the client (now referred to as the “respondent”). Attorneys are advised to immediately file Form EOIR-28, Notice of Entry of Appearance, after which court correspondence will be directed to the attorney. The attorney will not be recognized until Form EOIR-28 is filed with the court and served upon the DHS Office of Chief Counsel. Form EOIR-28 should be printed on light green paper for easy identification in the government’s files.

DHS Office of Chief Counsel also requires that **Form G-325A** be submitted in any asylum case before the Bloomington Immigration Court. This form is not required by the Asylum Office and will need to be prepared and served upon Chief Counsel, with a copy and certificate of service to the Immigration Court. This may be submitted at the initial Master Calendar hearing or soon thereafter. Your client will also be required to be fingerprinted, even though they were previously fingerprinted as part of the affirmative application process. Please see the above notes regarding this fingerprinting process.

Defensive Applications

In certain cases, an individual may not have a chance to file his or her asylum application affirmatively. Individuals who are caught by DHS crossing the border are subject to the credible fear process and then placed in removal proceedings. Anyone initially expressing a fear of return upon arrest is given a credible fear interview with a trained adjudicator who determines whether the fear of return is credible. If found to have a credible fear (and approximately 95% are) the individual would then be placed in removal proceedings and allowed to make an asylum claim.

Other individuals may have been living in the United States undetected and without status for years, and somehow come into contact with DHS. Those individuals would be given a chance to seek asylum as a defense to being removed. They may file initial applications for asylum before the Immigration Judge. These applications are generally referred to as “defensive” applications.

When filing an initial application for asylum before the Immigration Judge, file the following with the Immigration Judge in court:

- Form EOIR-28, Notice of Entry of Appearance as attorney, on green paper;
- 2 copies of Form I-589, Application for Asylum in the United States, unsigned;
- Form G-325A, Biographic Information Sheet (original form to the DHS trial attorney with copy to the Immigration Judge);
- 2 copies of the client’s affidavit;
- 2 copies of any supporting documentation (original documents must be surrendered to the DHS trial attorney for forensics investigation);

case if work permission is important to the client. You can check the number of days on the “clock” by calling the EOIR phone system at 1-800-898-7180 and selecting option 2 (after entering and verifying name and A number).

- Complete copy of the client’s passport, if available (original passport must be surrendered to the DHS trial attorney);
- Passport style photographs of the client (original on copy to DHS).

The asylum application must be filed in person at a Master Calendar hearing. Asylum applications before the Immigration Judge may not be filed by mail or at the court-filing window. Service of all documents must be made upon the DHS Office of Chief Counsel, either in person or by mail, providing a single copy of items noted above unless the original is required. The photographs of the client must be attached to the copy of the asylum application served upon the DHS Office of Chief Counsel.

Notice of the Hearing

Clients (or their attorneys, if an appearance has been filed) receive written notice of the date and time for the Master Calendar hearing. Because of the nature of The Advocates’ cases, volunteer attorneys sometimes receive short notice of these hearings, but little preparation is required. Attorneys are advised to submit Form EOIR-28, Notice of Entry of Appearance, to the Immigration Court (with service upon the DHS Office of Chief Counsel) immediately upon assignment of a removal case or referral of an affirmative case by the Asylum Office.

The Master Calendar Hearing

When and Where

For non-detained clients, Master Calendar hearings are typically held on Wednesdays, Thursdays, or Fridays before an Immigration Judge at:

Executive Office for Immigration Review (EOIR)
 7850 Metro Parkway, Suite 320
 Bloomington, MN 55425
 (612) 725-3765

For detained clients, the Immigration Judge holds hearings on Tuesdays and Thursdays in the lower level of the Department of Homeland Security – Immigration & Customs Enforcement, Detention & Removal at 2901 Metro Drive, Bloomington, MN 55425.

Arriving at the Court

To appear for your Master Calendar hearing for a non-detained client, bring your client to the court at least fifteen minutes before your scheduled time. On the bulletin board in the waiting room a docket will be posted which should include your client’s name, his or her “A-Number,” your name and the client’s language. There will be two sign-in sheets posted next to the docket sheet. One is for attorney sign-in; the other is for unrepresented individuals. Print your name, the client’s name & A number on the attorney sign-in sheet; the Judge’s clerk will use this sheet to call your case and escort you to the

courtroom. If you have not already filed an appearance, you can do so at the hearing, by obtaining two copies of form EOIR-28 from the folder next to the clerk's window in the waiting area. You should fill them out and serve one on the DHS Trial Attorney and the other on the Judge at the time your case is called.

The Immigration Judge

There are two Immigration Judges at the Bloomington Court. The Immigration Judge who presides over the client's Master Calendar hearing will also be the Judge who conducts the hearing on the merits and decides all motions. After appearing at a Master Calendar hearing, you should confer with your consulting attorney or The Advocates' staff about deadlines and any questions you may have about preparation for the merits hearing.

Interpreters

The Immigration Court provides the interpreter for the hearing. The court employs a Spanish language interpreter; all other interpreters appear by contract. The court generally will not provide a contract interpreter for your client at the initial Master Calendar hearing. If a contract interpreter is required, you may request a continued hearing, or you may proceed in English or with the help of a friend or family member. It is important to make a note on the record if your client speaks a particular language or dialect so that the court clerk may order the proper language for the final hearing. If the contract interpreter is clearly not making himself understood to the client, you can request a continuance on that basis.

Attendance of the Client

Please note that the client must be at all hearings before the Immigration Court, including the Master Calendar hearings; the attorney cannot appear alone. Your client can be ordered removed *in absentia*, if he or she fails to appear. Also, every person who has been issued a Notice to Appear (NTA) must attend. This applies to small children as well; their parents cannot attend for them. You may ask the Immigration Judge to waive the presence of the child at future hearings as long as he or she is represented, but it is discretionary and not automatically granted. If there is a compelling reason why a client cannot appear in person, the attorney can file a motion to waive appearance in advance of the hearing, but there is no guarantee that such a motion will be granted. It is not advisable to do so, except perhaps in the case of children.

Your client should be prepared for a formal court setting. Although proceedings are generally far less formal than those in state or federal courts, remember to discuss basic courtroom attire and etiquette.

Preliminary Master Calendar Business

When your case is called, the Immigration Judge is likely to talk with you off the record to determine your intentions and to straighten out any procedural problems. At that time, you can advise the judge that you are a *pro bono* attorney working with The Advocates. On the record the judge will state the nature of the proceedings and ask your client if she understands what is happening.

Make sure to discuss the hearing in advance with your client, explaining both the legal nature of the hearing (a hearing to determine whether he or she should be ordered removed from the U.S.), and the way the hearing is expected to proceed (remembering that your client has no idea this is an initial scheduling hearing and may be fearful of being deported at the end of the hearing that day).

Tips for Clients for Master Calendar Hearings

Prepare your client for a brief hearing at which you will do most of the talking. It is important that they know to answer questions loudly, clearly, and with “yes” or “no” instead of head nods or “uh huh.” The proceedings are tape-recorded, which explains the need for clients to speak up. There may not be an interpreter available at the Master Calendar hearing.

The client should be prepared to do the following:

- Clearly and audibly state his or her name for the record,
- Verify his or her current address, and
- State whether you are his or her attorney.

Your client will sit next to you at the counsel table during the Master Calendar hearing. Remain seated throughout the proceedings, even when addressing the court or opposing counsel. Immigration court proceedings are tape recorded. Statements made while standing frequently fail to appear audibly on the tapes, making a record of the proceedings incomplete.

Most questions at the Master Calendar will be addressed to counsel, including pleadings. At the close of the initial Master Calendar appearance, the Immigration Judge will ask the client if they have understood what has taken place, advise them to address questions to their attorney, and warn the client that failure to appear at a future hearing will result in an *in absentia* order of removal.

Master Calendar Hearing Procedure

1. **Questions to the Client.** After the client’s name and address are confirmed, the client will be asked if the attorney is his or her representative. It is important to prepare your client to answer this question clearly on the record. Make sure to prepare your client to speak clearly and loudly enough for the judge to hear.
2. **Attorney Identification.** You will then identify yourself – “Attorney B for the Respondent”
3. **Verification of Receipt of Notice to Appear.** The attorney will then be asked if the client has received a copy of the Notice to Appear. If not, he or she should

- say so and ask for a copy. The judge will often grant continuances (or even allow the hearing to proceed later the same day) so that the attorney can go over the NTA with the client to determine whether the charges are correct and if there is any question about their accuracy, then a continuance should be sought.
4. **Entering Pleadings on the NTA.** The attorney will be asked to either admit or deny the factual allegations and to concede or deny removability as charged on the NTA. In order to be eligible to apply for asylum, the client must be found removable on one of the grounds. It is customary in immigration court for the respondent to admit the allegations, and concede the charge of removability where the record contains charges readily sustained by the evidence already in the record. Discuss the strategy for pleadings with your consulting attorney or The Advocates staff prior to the hearing.
 5. **Designating a Country for Removal.** Next, the judge will ask if the client wishes to designate a country of removal. In asylum cases, the attorney should state that he or she “declines to designate.” The judge will then identify the client’s home country as the country of removal.
 6. **Statement of Relief Sought.** The attorney or the client will then state for the record that the client wishes to apply for asylum. In addition, you should also request alternate grounds of relief, such as *Withholding of Removal and/or relief under the Convention Against Torture*. Request Voluntary Departure if your client qualifies, bearing in mind the strategic considerations discussed in the Voluntary Departure section.
 7. **Frivolous Filing Advisal.** Your client will then be given an Advisal of Consequences of Filing a Frivolous Asylum Application by the Immigration Judge. This advisal is provided orally and in writing to the applicant. Asylum applicants who have been advised of the consequences of filing a frivolous application and who are subsequently found to have deliberately fabricated a material aspect of the claim will be denied asylum and permanently barred from any immigration benefits in the United States.
 8. **Filing Deadline for Asylum Application.** The judge will then set a date for submission of the completed written asylum application in court (if necessary). Keep in mind this does not apply to referred cases from the Asylum Office.
 9. **Hearing Date.** Next, the judge will set a date for the hearing on the merits of the claim, which will generally be several months distant.²² The judge usually asks how much will be necessary to complete the hearing. Asylum cases typically require four hours. Absent extremely unusual circumstances, the court will initially schedule the case for either three or four hours, depending on availability. If additional time is required, the case will be continued for further proceedings.

Note: Cases that have been pending less than 180 days will be set for a merits hearing on the court’s expedited calendar and will be heard before the 180 days have expired. If you cannot prepare your case within that time frame you may request a continuance. The case will be scheduled for a date further out on the calendar. Your client’s “work

²² This is subject to change, depending on the docket, and can range from six months to a year or more. If your client is detained, you will receive an expedited hearing date. Most detained individuals have their hearing date set for one or two months out.

authorization clock” will be stopped, meaning your client will be ineligible for employment until granted asylum.

10. Document Deadlines. The judge will also set forth a document submission schedule. While the Local Operating Procedures currently permit filing of documents as late as 10 days prior to the merits hearing, the judge may set a particularized document submission schedule at the time of the Master Calendar hearing. These deadlines must be followed or supporting evidence may be rejected. As of July 1, 2008, the Immigration Court Practice Manual will be effective and the document filing deadlines stated there will supersede the Local Operating Procedures.

You will not receive a written order regarding these document deadlines. It is therefore very important that you keep notes during the Master Calendar hearing regarding the deadlines. Generally the following deadlines should be noted:

- Original Documents: should be turned over to OCC immediately; or if documents are received later, the Court will likely establish a “no later than” deadline. After that time, you would need a motion for late-filing. Original documents generally applies to documents from overseas. An affidavit from someone in the U.S. does not generally fall into this category.
- Passport: should also be turned over to OCC immediately – if not at the Master Calendar hearing, as soon as possible afterwards.
- G-325A: generally no later than six months before the final hearing.
- Red-lined asylum application: usually 10 days before the final hearing.
- Additional supporting documents (non-original): this is the date the judge will set, and it varies from 60 – 30 – 10 days before the hearing.
- Witness list: usually 10 days before the final hearing.

A Note about Detention

The climate regarding detention of asylum seekers in our district is currently evolving. There is currently (since November 2006) a program in place that seeks to monitor asylum seekers and others in removal proceedings more closely to increase ICE’s ability to remove people, should that become necessary. This program has used the ISAP (Intensive Supervised Appearance Program) extensively. Your client may receive an appointment letter at his or her master calendar hearing, instructing him or her to meet with a detention officer about the case. At that meeting, the detention officer will notify you whether the client will be enrolled in the ISAP program, or on a less restrictive “order of supervision.”

The ISAP program requires clients to wear an ankle bracelet monitor for one month, and to check in, in person, at the ISAP office frequently during the first month. Assuming the person meets all the requirements, the ankle bracelet monitor is removed after the first month, however regular check-ins continue, at a reduced frequency. The client will remain in the ISAP program until either he or she wins asylum; or until removal. Many

clients are aware the ISAP program exists, and are very concerned about the ankle bracelet and requirements. We encourage you to discuss the possibility of the program with your client when you receive the appointment letter.²³

Additionally, detention is a possibility for some asylum seekers. If your client lacks identity documents, entered using fraudulent documents, or is found to have submitted fraudulent documents, there is a possibility that ICE may decide to detain your client. In most cases, your client can request a bond hearing and possibly post a bond to be released. There are a few cases where bond is not an option. If you identify the above issues in your case, especially lack of any identity documents, please contact The Advocates' staff and/or your consulting attorney so that we can advise you regarding the possibility of detention.

A recent BIA decision indicates immigration judge does not have authority to release an alien from ISAP program under 8 C.F.R. § 1236.1(d)(1) 7 days after release from detention. *Matter of Aguilar-Aquino*, 24 I&N 747 (BIA 2009) (“Custody” under 8 C.F.R. § 1236.1(d)(1) requires physical confinement within a limited space and does not include “wearing an electronic monitoring device” as a part of DHS’s Enhanced Supervision/Reporting program.)

Preparing for the Trial

Merits hearings in asylum cases are formal, adversarial, evidentiary hearings on the record. The DHS trial attorneys act as “prosecutors,” whose role is to attempt to disprove the applicant’s eligibility for asylum. Witnesses are sworn, and both sides have the opportunity for direct and cross-examination. Immigration judges are usually also very involved in questioning your client. It is not uncommon for an immigration judge to take over your direct exam and ask questions of your client directly.

Removal hearings are excellent “training courses” for new litigators, since they are formal, contested trials, but at the same time there is minimal discovery or motion practice, and Federal Rules of Evidence and Procedure are relatively relaxed.

Motion Practice

There is little formal motion practice in immigration court, however there are a few situations worth noting where motions are required.

- Change of Venue: if your client was initially placed in removal proceedings someplace other than Minnesota, it will require a motion to change venue. This motion should be filed with the court where the case is currently, requesting that venue be changed to Minnesota. Sample Motions are available from The Advocates. Simply changing the client’s address with the court will not change

²³ There is a practice advisory describing this program in more detail on www.probono.net. When there are developments such as the implementation of this program, we will update probono.net and send e-mail advisories to those registered on probono.net. We encourage you to check this site for information.

- the venue. In most jurisdictions, a Motion for Change of Venue must be filed at least 20 days prior to the scheduled hearing.
- Withdraw and Substitute Counsel: may be required if your client was previously represented in court by The Advocates staff or another attorney. Entry of an EOIR-28 with the Court is not sufficient if another attorney is previously entered.
 - Continuance: should be filed a minimum of 20 days in advance of an individual hearing, to allow time for DHS to respond. Please refer to the local rules for further advisement.
 - Late-filing of documents: if a document is being filed outside the deadlines set by the Judge, a motion explaining why the document was not previously submitted and requesting late-filing is well advised.

Preparing Your Pre-Trial Submissions

Original document submissions to OCC need to include a complete copy of all documents being submitted (just as you submit to the Court) with the originals in a separate envelope marked “ORIGINALS” with the client’s A number and name.

Pre-trial briefing is not required, and given the high volume of cases handled by the immigration court, briefs should be kept to minimum and are generally submitted only where a novel or particularly complex issue is presented.

All supporting documentation must be submitted in compliance with the Local Operating Procedures (2-hole punched, indexed, paginated). You may consider organizing the annotated index/table of contents according to subheadings that support the arguments in your case and highlighting key evidence in your index in yellow, as this may be all the judge reads.

You should also submit a list of proposed witnesses with their name, address, phone number, A number (if they have one) and a summary of their testimony.²⁴

You will need to make corrections and updates to the I-589 in advance of the hearing. These corrections should be made by marking all changes with a red pen on a photocopy of the form. This “red-lined” asylum application should be submitted to both the immigration judge and the DHS Office of Chief Counsel in accordance with the document filing deadlines set by the Court (typically 10 days before the final hearing). It is important to make certain that names, addresses, dates, A-numbers, etc. are up-to-date and correct. Corrections made by the asylum officer are often NOT included on the copy of the I-589 the judge received.

Note: It is important to carefully review the original application for errors or inconsistencies, as these can (and will) be used against your client in a credibility determination. Where the attorney knows there will be substantial or even minor

²⁴ Please refer to the Local Operating Procedures and the Immigration Court Practice Manual for additional, detailed guidance on witness lists, and document submission specifications. Available at www.usdoj.gov/eoir.

inconsistencies between testimony and earlier submissions (including statements given to a DHS officer or statements made during the credible fear interview) an attempt should be made to correct these inaccuracies, which clearly states the reasons for the inaccuracies. Prepare your client for questions from DHS about why there were inaccuracies or omissions in the original application.

Often asylum seekers have submitted their own *pro se* applications before seeking The Advocates' assistance, and these may have substantial errors. For example, many clients have unwittingly filed boilerplate applications prepared by others and signed applications whose contents they know nothing about. Additionally, some clients initially file applications containing asylum claims that they believe are more acceptable to U.S. judges and lawyers, but which subsequently turn out to be fabrications. If this is the case, you should offer correct information and a strong explanation for the inconsistencies as early as possible before the hearing by means of a detailed affidavit from the client if possible or at the outset of the hearing and through the client's own testimony.

Forensic Examination of Documents and Overseas Investigations

The DHS Office of Chief Counsel makes every effort to investigate the claim made by asylum applicants. It is essential that attorneys work thoroughly with their clients **before submitting any documents or making any claims** to ensure that documents are authentic and that claims are accurate and can be corroborated. Advise the client that all documents submitted to the Asylum Office or Immigration Court may be investigated, that the U.S. government may contact witnesses in foreign countries, and that witnesses in the United States may be called at trial. A finding that a document has been fabricated or other evidence of fraud will be extremely difficult to rebut and will likely result in an order of removal against your client.

The immigration judge will require that you provide the DHS Office of Chief Counsel with original documents so that they may verify their authenticity at the Forensic Documents Laboratory. Sending documents to the Forensic Documents Lab and obtaining results usually takes the Department several months. The DHS trial attorney may ask the judge for a continuance of your case in order to obtain forensic information. If the continuance is unreasonable or if your case is continued and they request a second continuance for the same purpose, we suggest that you oppose those continuances if you believe they are inappropriate or will create more hardship to your client. If an adverse or ambiguous FDL report is submitted against your client, you may be able to conduct an independent forensic investigation. Work with your consulting attorney to obtain the original documents from the DHS for independent investigation.

It is a common practice of the DHS Office of District Counsel in Minnesota to enlist the assistance of the U.S. consulate in the applicant's home country to conduct investigations of the client's claim. Overseas investigations may place clients' families or colleagues in danger revealing the contents of the asylum claim to home country officials. If you believe that an investigation has caused threats or harm to the client's family or the client, you may be able to raise a refugee sur place claim, arguing that the government's investigation has created a basis for your client to fear harm. If this issue comes up work with The Advocates staff and your consulting attorney to make sure your client's rights are protected. In general, overseas investigations are extremely difficult to challenge, as the DHS fails to make available investigators or witnesses for cross-examination.

Preparing Your Client to Testify

It is important to explain the hearing process in detail to your clients, so that they understand what will occur and what is expected of them at the hearing, as well as the potential outcomes. If possible, you should conduct a mock hearing with the help of your consulting attorney or The Advocates staff so that they may best understand how the hearing will be conducted. Explain carefully the roles of the judge, the DHS attorney, the client's attorney, and the client. For example, clients may feel attacked during cross-examination when the DHS attorney questions their story if they do not understand that the purpose of cross-examination in the adversarial system is to explore the weaknesses of the cases for decision by the judge.

Encourage your clients to dress nicely for the hearing. Make sure they are familiar with basic courtroom conventions, such as rising when the immigration judge enters the room. If your client does not speak English, make sure they understand that they will need to pause during the testimony for translation by the interpreter. Practice with an interpreter at least once if one will be used at trial.

Additionally, you should be aware that it is very common for witnesses to vary their testimony on the stand from what they have stated in your interviews. They often testify about certain things, sometimes key elements, and/or may suddenly state new facts that you have never heard before. In addition, all witnesses, particularly respondents, are generally very nervous and thus likely to forget certain things. For example, clients often forget dates or even years in which events happened. Work closely with your client, over a series of preparatory meetings, so that he or she is familiar with the questions you will be asking and with all details of his or her written application and affidavit.

Procedural Rules

Because hearings are administrative, they are generally less formal and unlike Federal or State Court, there are not the same “Rules of Procedure” in immigration court. For guidance on procedure, refer to the regulations found at 8 C.F.R. §§1001 et seq., and also the Local Operating Procedures for the Bloomington court (until June 2008) and then the Immigration Court Practice Manual (after July 1, 2008). Rules of evidence in asylum hearings are minimal and very casually observed. Formal presentation of evidence is generally not required. Judges will simply admit documents or physical evidence, sometimes permitting argument but rarely requiring formal authentication. Similarly, objections to evidence, particularly hearsay objections, are rarely made or upheld.

Generally, this very flexible view of the rules of evidence works to the advantage of your client. Asylum seekers are rarely able to offer evidence beyond their own testimony that would stand up to rigorous rules of evidence. For example, it is understood that producing a third-party declarant or authenticating a document is simply out of the question, particularly in the case of an asylum seeker who fled for his or her life. Thus, many kinds of evidence that would present difficult issues in other courts may be easily admissible in immigration court.

Respondents and other witnesses may testify freely about what other people told them. Letters from friends or family members may often be introduced with little difficulty (though not always), as long as they are accompanied by translations. Documentary evidence, such as newspaper articles and general treatises are routinely admitted without objection. Thus volunteers should not shy away from attempting to admit any evidence as an argument can be made that it is probative of the client’s claim in some fashion. Needless to say, however, the immigration judge will give all of the evidence the weight that he or she thinks it deserves. Particularly marginal evidence may be admitted by the judge but viewed with a great deal of skepticism.

The Record

As with the Master Calendar hearings, the formal record of the case is made on a tape recorder, controlled by the judge, who may stop and start the tape at will. If a discussion takes place when the tape recorder is not running, be prepared to restate the conversation for the record. If you are unsure whether the tape recorder is running, ask the judge. You are not permitted to bring your own stenographer or otherwise make your own record of the hearing.

It is always a good idea to make certain that names of people, places, and organizations are spelled clearly for the record. This is generally done by the client, but can also be done by the attorney. For languages that do not use a Roman alphabet, such as Oromiffa, Arabic, Chinese, or Punjabi, spelling will have to be used. *It should be noted for the record that the spelling is phonetic and approximate.*

The Role of the Judge at the Merits Hearing

Judges in asylum hearings play a very active role and almost always engage in extensive direct and cross-examination. Each judge conducts hearings in his or her own particular style. You are strongly encouraged to attend and observe a merits hearing held before the judge presiding in your case, for purposes of gauging how he or she conducts proceedings. If it is not possible to attend a hearing before a particular judge, you should, consult with The Advocates and talk to another volunteer who has practiced before that judge.

The DHS Trial Attorney

The Department of Homeland Security is represented by one of the trial attorneys from the local Office of Chief Counsel – Department of Homeland Security (DHS). The DHS trial attorney represents the government and generally plays an adversarial role. You may call the trial attorney prior to the hearing to discuss particular matters of concern but calls frequently are not returned due to the attorneys' heavy trial schedules. It is not, however, general practice in Minnesota to conduct a pre-trial conference and DHS attorneys will not stipulate to any issues prior to the hearing.

Logistics of the Individual Hearing

The courtroom is generally arranged in traditional fashion, and the respondent and lawyer sit at the table on the left side of the room (as you face the judge's bench), while the DHS trial attorney sits on the right. Witnesses testify from the witness stand next to the judge. Attorneys typically remain seated throughout the proceedings.

Removal hearings are open to the public, although there are almost never any spectators other than the persons connected with the case. However, asylum hearings can be closed to the public at the request of the Respondent. Witnesses are excluded from the

courtroom on the government's motion. They should be warned to bring along a good book to read while they wait in the waiting room.

The Individual Calendar Hearing

Arriving at the Court

Asylum hearings usually begin promptly, so you and your client should arrive at least fifteen minutes in advance of the scheduled time. You should first report to the clerk at the window to acknowledge that you and your client are present and ready for your hearing, and indicate which judge. The clerk will ask you and your client to wait until the courtroom is opened; often the judge will come to the waiting room and let you know to enter the courtroom. The DHS attorney will likely also be in the waiting area. If you have questions or wish to have a conversation with them, this is the best opportunity. A small, private interview room adjacent to the waiting room is available for attorneys to meet with clients.

The Hearing

Before the start of the hearing, the judge will generally engage in a substantial amount of off-the-record conversation, reviewing the file, identifying exhibits, and clarifying issues, such as the status of previously filed motions, or the number of witnesses the respondent will call.

1. **Interpreter:** If you have an interpreter present, the interpreter will be sworn to his or her interpretations before any other matters are addressed. This would be the moment to raise any potential conflicts: with certain small communities, the interpreter may know your client. If the relationship could affect the case, the case may be continued to get a different interpreter.
2. **Client identification:** As at the Master Calendar Hearing, the judge will first ask your client to state his or her name, verify his or her address, and state whether or not you are his or her attorney.
3. **Marking Exhibits:** The judge will next review the exhibits that have been marked to this point, and mark any new filings. This is the opportunity to object to any of the government filings, and for them to object to your filings. Objections are rare, and typically relate to the timeliness of filing. There is no "authentication" process; barring any objections, all exhibits are typically received into the record at this point. If either party does object to a particular piece of evidence, the judge will usually permit brief arguments and rule quickly. Occasionally, specific items such as expert witness affidavits or *curriculum vitae*, or pieces of direct evidence, such as letters or documents, will draw objections that the judge is not comfortable ruling on at that point. In these circumstances, the judge may instead reserve his or her ruling until the attorney presents the evidence during the course of the case.
4. **Correcting and Updating Information:** The judge will review the changes in the red-lined asylum application and ask if there are any additional changes. If

- you have forgotten a change, you should mention and make it verbally on the record. Once the judge has verified that the asylum application is fully updated, the client will be called up to the witness chair to sign the form attesting that he or she knows the contents and that it is true and correct.
5. **The Oath:** At this point, the judge will also have the client take the oath to tell the truth. Prepare your client for this, and explain the consequences of failing to tell the truth on the stand.²⁵
 6. **Opening Statements:** Generally, there are not opening statements in immigration court. If permitted, you may make a very brief opening argument. In no case should this take more than a few minutes. If you feel there are issues you need to raise in advance, an opening statement could be very useful, however, check with the judge before proceeding.
 7. **Direct Examination:** Direct Exam proceeds in immigration court very much as in Federal or State Court. The attorney should be well prepared for direct examination and the client should be well rehearsed in how to conduct himself or herself. The client should be advised to answer questions succinctly without engaging in long narratives, and should state clearly when he or she does not understand a question.

Since asylum hearings are brief, typically scheduled for three or four hour time slots, direct examination should be prepared with an eye on the clock. Preliminary information should be gotten out as quickly as possible. Duplicative information can and should be eliminated, where there is no particular reason to bring it out in testimony. Leading questions are generally objected to, and the objections are generally sustained. To avoid time-consuming arguments, you should simply prepare the client in advance to answer non-leading questions. We recommend that you prepare a written question and answer sheet with the client, reviewing it for accuracy. Check it against the written asylum application and the client's affidavit (as well as corroborative evidence).

Note on Voluntary Departure: If your client wishes to seek voluntary departure, you must “qualify” him or her for voluntary departure through a series of questions. This is usually done at the end of direct exam. Prepare your client for these questions (more information available in the “voluntary departure” section) so they are not surprised during direct.

8. **Cross Examination:** After direct examination, the DHS trial attorney will conduct cross-examination, generally focusing on credibility. Again, though there are essentially no rules to procedure or evidence, you should raise objections when the questioning is inappropriate. One of the most common objections is

²⁵ As with any case, it is possible that your client may decide not to tell the truth on the stand. If you have concerns before the hearing, make sure and emphasize to your client the consequences of filing a frivolous asylum application and of lying under oath. Also, review the ethical obligations you have as an officer of the court. You may need to interrupt the proceedings to have a discussion with your client about false testimony. If your client refuses to correct the lie, and/or wishes to continue, you should withdraw. If you have ethical questions or concerns, please contact The Advocates and/or the Lawyers Board for advice.

“relevance,” however be aware that due to the broad subject matter of an asylum claim, judges frequently allow questions that are tangentially related as they may reflect on credibility. Generally the government’s case relies solely upon the cross-examination. Redirect is permissible and strongly recommended where cross-examination has raised damaging issues. Remind your client when preparing for the hearing that you will clarify questions raised on cross-examination.

Tips for Testimony:

- Remind your client to answer “yes” or “no” and not to nod or use “uh-huh”
- Spell the names of people or places for the record (the client usually should do this, but you can as well)
- Make sure your client knows to speak up, so he or she can be heard on the tape and by the DHS attorney & interpreter
- If an interpreter will be used, remind your client to speak in shorter sentences so the interpreter has a chance to interpret the entire answer.
- Also, if using an interpreter for a client who understands English, remind him or her to wait for the interpreter before answering a question.
- Create a signal (such as raising your pen) for your client when you want him or her to stop talking – often asylum clients get nervous and tend to speak in rambling narratives on the stand. Prepare in advance to stop your client and refocus the questions.

9. **Examination by the Immigration Judge:** The immigration judge will usually conduct his or her own extensive examination, generally after both direct and cross are completed by the attorneys. The judge may interrupt direct and cross-examination repeatedly and extensively, which can disrupt the flow of the attorney’s questions and rattle the client. The court’s questions may be objected to if appropriate, and you should attempt to state your objections on the record and make note of the issue for purposes of a Notice of Appeal, if necessary. In rare cases, you may instruct your client, on the record, not to answer a particular question, most likely based on the Fifth Amendment right against self-incrimination. However, the judge is nonetheless likely to insist that the question is answered anyway, and you must weigh the value of such aggressive tactics against the probability that it might affect the judge’s decision negatively.
10. **Closing Statements:** closing statements are a valuable chance to summarize your client’s eligibility for asylum using the testimony he or she made. It is also a chance to clear up any questions of law or fact which have arisen during testimony. If there is particular case law which resolves issues in your client’s favor, this is an opportune time to mention the case and citation.
11. **The Decision of the Immigration Judge:** Usually, the judge will issue his or her oral decision immediately at the close of the case. The judge may simply discuss what his decision would be and on what grounds he has decided, or he may recess the hearing for half an hour and return with a decision which will be read into the

record. When the immigration judge issues the oral decision, whether favorable or unfavorable, the respondent receives only a form order filled out and signed by the judge.

When the judge is rendering an oral decision, the attorney should pay careful attention and make note of the bases for the decision, and any areas where the judge misstates, misinterprets, or overlooks evidence or matters of law. If the respondent loses, the Notice to Appeal that is filed must state specific grounds justifying the appeal, not just a general statement of boilerplate language. The judge's oral decision transcript will not be available until the tapes are transcribed and the briefing schedule is set, so notes of the decision are essential.

Prepare your client for the decision language. Usually the client will sit at the back of the courtroom with the interpreter, so the interpretation can be made without being heard on the tape. The immigration judge will recite the charges in the NTA, the procedural history, the facts, testimony and law before reaching his or her ruling. Advise the client that the actual decision will not come until the very end of the recitation. It is likely that your client will not understand the legal language used in the decision, so you will have to explain the decision at the close of proceedings.

After the decision has been issued orally, each side will be asked whether they choose to reserve appeal. In some cases, if your client wins, the DHS trial attorney will reserve appeal and will have 30 days to perfect the appeal. After the hearing on the merits, please notify The Advocates of the outcome and provide a copy of the order.

12. **No Decision:** In increasing numbers of cases, the immigration judges are continuing the case. In some circumstances this is to allow DHS time for forensic examination of documents; in others it is because your client needs to provide additional documentation or proof before the judge is willing to rule on the case. Prepare your client for the possibility that there may not be a decision that day. If there is not, usually the case is set to another Master Calendar hearing date to check on the status of evidence gathering, background checks or the other reasons for continuances.

Frivolous Findings and the Possibility of Detention

The asylum law provides that anyone making a frivolous application for asylum be permanently ineligible for any immigration benefits. INA § 208(d)(6). In order to be found to have filed a frivolous application, the individual must have been advised of the consequences of filing a frivolous application. INA § 208(d)(4). This generally means the Judge will read the notice, and provide a written notice to the applicant at the master calendar hearing. A determination of frivolous filing will generally be made at the conclusion of proceedings. If it appears that your client has filed a frivolous application, or the government or Judge threatens a frivolous finding, it may be advisable to withdraw the asylum application to avoid the frivolous finding. Frivolous findings are not

frequently made, but be aware of this possibility if your case involves findings that the client has provided false documents or false testimony.

In a case where there are false documents, false testimony, a frivolous finding, or a lack of any proof of identity, it is possible that your client may be detained at the conclusion of the hearing. If you think this is possible, you should advise your client that he or she may be detained at the close of the hearing. In such a case, the detention officers will usually escort your client out of the courtroom, handcuff him or her, and take him or her across the street to the ICE processing area in the lower level of the 2901 Metro Drive building. From there, he or she will be transferred directly to one of the county jails that ICE contracts with to hold immigration detainees. Your client will not have an opportunity to go home or gather belongings. There are many logistical considerations for a client if he or she is detained. Please speak with your consulting attorney or The Advocates staff if you need assistance with a detention situation.

Appealing to the BIA

An unsuccessful applicant may appeal to the Board of Immigration Appeals (BIA), an administrative body in Falls Church, Virginia. The appeal requires a Form EOIR-26, Notice of Appeal, specifically articulating the grounds of appeal, which must be received by the BIA within 30 days of an oral decision or mailing of a written decision, and a \$110 filing fee or application for fee waiver, Form EOIR-26A. The Notice of Appeal must be served upon the Office of District Counsel, accompanied by certificate of service. If counsel is appearing on behalf of the respondent, a new Notice of Entry of Appearance, Form EOIR-27, must be included. The order of the immigration judge is automatically stayed upon timely filing of the Notice of Appeal. Attorneys are strongly encouraged to obtain proof of mailing of the Notice of Appeal. The BIA Clerk's Office receives a high volume of cases, and errors are not uncommon. We strongly advise using FedEx or another overnight delivery service to ensure the appeal is received on time. The Board does not grant any leeway to the 30 day deadline and applies a "receipt" rule rather than a date of mailing rule.

Some months after the filing of the Notice of Appeal, the BIA will send a transcript and briefing schedule. The briefing schedule provides 21 days for the filing of the brief, with the period running from the date on the schedule, not the date received. This often means you receive the transcript with approximately two weeks to file the brief. You can request an extension of the briefing period, and this is routinely granted by the Board.²⁶ An extension provides an additional 21 days. Once your brief is filed and served on the DHS, they will have an opportunity to file a response. In most cases, DHS does not file any brief. You will receive a decision from the Board some time after filing your brief. There is not a fixed time frame for Board adjudications, although we have seen the backlog decrease and decisions are being returned more quickly.

²⁶ Please refer to the Board of Immigration Appeals Practice Manual, available at <http://www.usdoj.gov/eoir/vll/qapracmanual/apptmtn4.htm>. There is guidance on requests for extensions, brief formatting, citation guidelines, and other matters relating to practice before the Board.

Under new regulations effective September 25, 2002, the BIA has limited fact-finding ability on appeal, which heightens the need for immigration judges to include in their decisions clear and complete findings of fact that are supported by the record and are in compliance with controlling law. *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002); *Matter of Villanova-Gonzalez* 13 I&N Dec. 399 (BIA 1969) and *Matter of Becerra-Miranda*, 12 I&N Dec. 358 (BIA 1967), superseded. Failure by the immigration judge to make complete findings of fact may therefore be a ground for appeal. Additionally, the Board has greater authority to review decisions and issue an Affirmance Without Opinion if they uphold the immigration judge's decision. This essentially means that the Board adopts the immigration judge's decision.²⁷ In the wake of the 2002 regulations, appeals from the BIA to the Circuit Courts have increased dramatically, it is therefore ever more important to raise as many legal claims as possible in the appeal so the record is well preserved should an appeal to the Circuit Courts become necessary.

Petitions for Review to the Federal Courts of Appeal

If the BIA rules against your client, he or she may be entitled to file a petition for review before the Court of Appeals. The petition for review must be filed in the circuit in which the immigration court hearing was held, regardless of the current residence of the client. Petitions for review of BIA decisions must be filed within 30 days of the issuance of the BIA decision.

The filing of an appeal with the Court of Appeals does not automatically stay the deportation. An Application for Stay of Removal, Form I-246, should be filed with the DHS Immigration & Citizenship Enforcement, 2901 Metro Drive, Bloomington, MN 55426. If ICE denies the application, a Motion for Stay of Removal may be filed with the Court of Appeals.

Where the BIA has denied a client's appeal, if there is any reasonable and non-frivolous ground for appeal, it should be pursued. The Advocates strongly encourages volunteers to consult the staff or with a consulting attorney early, before the BIA petition is issued, in order to make an initial determination of whether a petition for review is possible and how it should be handled. If you do not wish to handle the petition for review, The Advocates is willing to place the case with a new volunteer for that portion of the appeal.

²⁷ The BIA has a streamlined procedure pursuant to 8 C.F.R. § 3.1 (8 C.F.R. § 1003.1 (a)(7)) "wherein a single member of the BIA, rather than the usual three-member review, summarily affirms the outcome reached by the IJ but not necessarily the IJ's reasoning." *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004). In *Dominguez v. Ashcroft*, 336 F.3d 678, 680 (8th Cir. 2003), Dominguez argued "that the BIA abused its discretion by summarily affirming the immigration judge. Under the procedure established at 8 C.F.R. 1003.1 (a)(7), a summary affirmance by the BIA adopts the decision of the Immigration Judge. We [the 8th Circuit Court of Appeals] have noted on at least two occasions that the BIA does not abuse its discretion by adopting the decision of an immigration judge." *See Maashio v. INS*, 45 F.3d 1235, 1238 (8th Cir. 1995); *Safaie v. INS*, 25 F.3d 636, 641 (8th Cir. 1994). Although an agency must set out the basis of its decision, *See SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947), the opinion of the immigration judge is sufficient to satisfy this requirement. *See Albathani v. INS*, 318 F.3d 365, 377 (1st Cir. 2003) (summary affirmance scheme does not violate due process or rules of administrative law). For a practitioner's note on BIA Affirmance Without Opinion Litigation go to http://www.aifl.org/lac/lac_pa_index.asp.

The **REAL ID Act** amended judicial review of removal orders in the following ways:

1. It purports to eliminate all habeas corpus review of orders of removal, exclusion or deportation;
2. It does not address habeas corpus review of detention;
3. It expands judicial review of final orders of removal, exclusion or deportation via a petition for review in place of habeas corpus review, allowing some review of previously non-reviewable cases and issues;
4. It eliminates judicial review of certain immigration decisions by mandamus or the “all writs” statute, although it does not appear to eliminate all mandamus review in the non-removal context;
5. It expands the bar on judicial review of discretionary decisions and actions to include certain agency decisions and actions outside of the removal context.

The changes made by REAL ID may affect pending petitions for review.²⁸

²⁸ AILF has excellent, up to date guidance on how REAL ID has been interpreted and applied in the Courts. The most recent practice advisory about filing a petition for review in the wake of REAL ID is available at: http://www.aif.org/lac/lac_pa_041706.pdf.

ADDITIONAL INFORMATION

Employment Authorization

Although employment authorization is not an asylum applicant's automatic right, an asylum applicant may be authorized to work. *See* INA §208(d)(2); 8 USC §1158 (d)(2). Employment authorization may NOT be granted before 180 days after asylum application filing date.

It is important to know that if you ask for a continuance or if your client has in the past asked for a continuance of his or her case, the "clock" has been stopped by the DHS and your client may not be eligible for employment authorization because the 180 days required would not be reached, unless you can otherwise stipulate that a continuance will not stop the clock in your client's case. If your client is in removal proceedings, you can find out whether the "clock" is stopped or not by calling the Immigration Court case status line at 1-800-898-7180.

Employment Authorization Documents (EAD) for those with an Asylum Application Pending

Family members, including children, who are included in the asylum application and in the United States, are also eligible for a work permit. It may be advantageous to apply for a work permit for a child if he or she does not have other photo ID, and to get a social security number for the child.

1. **Eligibility:** The asylum applicant must demonstrate that he or she is eligible. This means showing the following:
 - That he or she has NOT been convicted of an "aggravated felony." *See* 8 C.F.R. § 274a.12(c) (8) and § 274a.13(a) and 208.7(a)(1).
 - That he or she has NOT failed to appear for an asylum interview or a hearing before an immigration judge (unless the applicant demonstrates exceptional circumstances for having failed to appear). *Id.*
 - That he or she has NOT had his or her asylum application denied by an asylum officer or an immigration judge within 150 days after applying for asylum. *See* §208.7(a)(4).
 - That he or she has NOT asked for a continuance in immigration court before 180 days since the filing of his or her application.

2. **When To File:** The applicant should file "no earlier" than 150 days after the date when his or her completed asylum application was filed, with one exception. *See* 8 C.F.R. §208.7(a) and §274a.12(c)(8). An applicant who has been recommended for approval may apply for employment authorization when he or she receives notice of the recommended approval. *See* § 208.7(a). However, if the asylum application is returned as incomplete, the 150-day period does not begin to accrue until the Department of Homeland Security receives a completed application. *See*

id. That means that any delay requested or caused by the applicant shall not be counted. *See* 8 C.F.R. §208.7(a)(2).

3. **What To File:** The following documents should be filed with an *initial* application for EAD:
 - Form G-28, Notice of Entry of Appearance (even if one is already on file with the asylum application).
 - Form I-765, the Application for Employment Authorization. Review the application carefully to make sure the client’s name is spelled correctly and that the date of birth and A number are correct. A mistake could mean the client’s identity documents are inconsistent or inaccurate.
 - Proof of Pending Asylum Application: either a copy of the receipt notice from USCIS or the hearing notice from the Immigration Court.
 - Fee or fee waiver: There is no fee required for the applicant’s first application for employment authorization. After the first application and for renewing employment authorization, the filing fee is \$340.00.²⁹ If the applicant can demonstrate an “inability to pay” the filing fee, then he or she may file a fee waiver request. The applicant should submit an affidavit or declaration asking for the waiver, stating his or her merits for obtaining employment authorization, and demonstrating the reasons for his or her “inability to pay.”
 - Photos: The applicant must also submit two (2) color passport style photos. Further, the applicant’s name and “A” number should be lightly printed on the back of both photos in pencil.
4. **Where to File:** For affirmative asylum applicants in Minnesota, North Dakota and South Dakota, the application is filed with the Nebraska Service Center at:

U.S. Department of Homeland Security
U.S. Citizenship & Immigration Services
Nebraska Service Center
P.O. Box 87765
Lincoln, Nebraska 68501-7765

5. **Timeline for Adjudication:** The Department of Homeland Security has 30 days from the I-765 application filing date to adjudicate the **initial** application for employment authorization. If a decision on the initial application is not received within 30 days, the applicant may be able to obtain an interim employment authorization document from the Bloomington USCIS office. Subsequent applications to renew work authorization take 90 days.
6. **Receipt:** The applicant will first receive a Notice of Receipt of the I-765 application. Once his or her I-765 application is approved, the applicant will receive a Notice of Approval, together with the EAD. The Notice of Receipt will contain a receipt number. The status of the pending application at the Nebraska Service Center may be tracked online at www.uscis.gov with the receipt number.

²⁹ Please review the instructions on the form carefully as fees change regularly, as well as filing addresses. This information is current as of April 15, 2008. The forms are available at www.uscis.gov.

Renewals

Employment authorization is valid for one year. It is renewable while the asylum application is being decided and, sometimes until the completion of any administrative or judicial review of the asylum application. *See* 8 C.F.R. §208.7(b). However, the renewal application must be filed **90 days before the previously issued employment authorization expires**. The CIS has 90 days to adjudicate subsequent renewal applications – schedule filing of renewal applications at least 90 days before the client’s current employment authorization document (EAD) expires to ensure the client is able to continue working. As stated above, renewals require the filing fee and proof the claim is still pending. Such proof depends upon the stage of the applicant’s asylum application. A copy of the following may be appropriate proof:

- For proceedings before immigration judge:
 - The asylum denial, referral notice, or charging document; or
- For applications pending at the Board of Immigration Appeals (BIA):
 - A BIA receipt of timely appeal; or
- For claims pending in federal court:
 - The petition for review or habeas corpus date stamped by the appropriate court.

Termination of Employment Authorization:

Employment authorization terminates after the applicant’s asylum application is denied. The following represents when employment authorization terminates, depending upon who terminated the asylum application.

- **Denial by Asylum Office:** Employment authorization terminates upon the expiration of the employment authorization document (EAD) or 60 days after the denial of asylum, whichever is longer. *See* 8 C.F.R. §208.7(b)(1).
- **Denial by IJ, BIA or Federal Court:** The employment authorization terminates upon the expiration of the EAD, unless the applicant has filed an appropriate request for administrative or judicial review. *See* 8 C.F.R. §208.7(b)(1).

FOIA Requests

If your client has had any encounter with INS or DHS, it is critical that you review the entire file (the A-file) as soon as possible. Obtaining the A-file is complicated – you must determine which agency (USCIS, ICE, or CBP) has the file. Each maintains a separate, centralized FOIA unit that results in extraordinary delays in processing requests. Previously responsive local procedures for FOIA have been eliminated. Because FOIA procedures are currently in flux, contact your consulting attorney or The Advocates staff regarding current filing addresses and procedures.

If your client’s case was referred to the immigration court by the Asylum Office, obtain a copy of the Asylum Officer’s Assessment to Refer and the Interview Notes through a

FOIA request to ICE. There is a special processing track for cases in proceedings and such requests should be sent to:

Attn: FOIA Director
ICE c/o Catrina Pavlik-Keenan, FOIA Officer
800 North Capitol Street
5th Floor, Suite 585
Washington, DC 20536

This request should be submitted on Form G-639, and must include proof that the client is in proceedings which may a copy of the Notice to Appear, Order to Show Cause, Written hearing notice, or Notice of Referral (any one of these documents will suffice). Requests of this nature can also be submitted by e-mail to cab.foia@dhs.gov with the required documents scanned and submitted as attachments.

If you were not the previous attorney, you may wish to review the client's Record of Proceeding at the immigration court. Once you have an EOIR-28, Notice of Entry of Appearance on file with the court you can go to the court and request an in-person review of the file. You are not allowed to copy the file or disassemble the file. The review is done in the waiting area of the court; it is therefore prudent to go on days when the court is less busy. Generally, any time except master calendar hearing mornings will be fine. If you want a copy of the file, you will need to file a FOIA request with EOIR, which is directed to the Headquarters office in Virginia.³⁰ File the request with U.S. Department of Justice, Executive Office for Immigration Review, Office of General Counsel – FOIA/Privacy Act Requests, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia, 22041, (703) 605-1297.

ADVISING YOUR CLIENT AFTER ASYLUM IS GRANTED

Once asylum is granted, your client is entitled to many benefits of their asylee status. If approved by the asylum office, he or she will receive a letter which enumerates these benefits. The Advocates is also available to speak with your client about the benefits and responsibilities of being an asylee. Theoretically, the DHS could at any time reopen the case to terminate asylum and remove the asylee if country conditions have fundamentally changed such there is no reasonable fear of future persecution. As a practical matter, the DHS virtually never attempts to remove an asylee's protected status, unless the asylee commits a crime or travels to the country from which asylum was granted. However, there have been cases where asylum was terminated due to fraud in the application; this frequently arises when the person files for permanent residence and checks reveal the fraud.

Asylum Benefits

Derivative Asylum For Spouse and Children in the United States

³⁰ See the immigration court website for specific FOIA information , including the address for requests – www.usdoj.gov/eoir. Do not use the USCIS form G-639 to make a FOIA request with the immigration court. A letter explaining your request with specific biographic information about the client is all that is needed.

Immediate family members present in the U.S. and included in the original asylum application automatically receive asylum. This includes the asylee's spouse and unmarried children who were under 21 years of age at the time the asylum application was filed. If the client and her spouse have a common-law marriage, which is very common in many countries, they should be strongly encouraged to get legally married in the U.S. as soon as possible – before the asylum application is adjudicated. For common-law spouses of asylees, it may be possible but difficult to obtain “humanitarian parole” at the discretion of the DHS. Discuss this with The Advocates staff and consulting attorneys.

Family Reunification – the I-730 Petition

For many clients, family reunification is their top priority. However, scrutiny of documents and relationships is increasing at both USCIS and the consular offices overseas, so it is vital to carefully prepare the petitions for family members. As mentioned above, it is important to have a frank conversation about different familial relationships and the realistic chances of reunification.

The asylee's spouse and minor, unmarried children under 21 are eligible for reunification. It is important to note that children over 21 may still be eligible if they were under 21 when the asylum application was filed. This is due to a change in law in 2002.³¹ However marriage makes a child no longer a child and therefore ineligible for reunification. Also, the relationship with the child had to exist when the application was filed or approved. This creates a problem if the spouse becomes pregnant after approval but before the I-730 is approved. If you have a situation where a child is born after the approval of the asylum, please notify The Advocates or your consulting attorney so we can assist. The marriage must have existed prior to the grant of asylum in order to make the spouse eligible for reunification.

The process of filing the I-730, Petition for Asylee Relative is relatively simple compared to other USCIS applications. There is no fee for the application. However, there is a filing deadline; the I-730 must be filed within two years of the grant of asylum. The following documentation is needed:

1. Form G-28, Notice of Entry of Appearance;
2. Form I-730, Petition for Asylee Relative: it is important to reference the I-589 and the birth/marriage certificates when completing this form to make certain the dates and names are all consistent. Inconsistencies on the form could result in problems approving the application, or possibly even raise concerns about fraud on the asylum application.
3. Recent photo of the family member;
4. Proof of the relationship: in most cases this means the birth certificate and the marriage certificate. However, in cases of out-of-wedlock births where the father is the petitioner, cases of adopted or step children, additional documentation will generally be needed. This includes proof of the relationship, such as proof of

³¹ See the Child Status Protection Act of 2002 for additional information.

financial support, medical records listing the parent, school records listing the parent, court decrees, and other evidence of parental support. In some cases, the consulate may request DNA testing. Work with your client to obtain photographs, birth certificates, and marriage certificates before the asylum application is approved to minimize delay of filing the I-730.

Once the applications are complete, they are submitted to the USCIS Nebraska Service Center. The filing address is:

U.S. Department of Homeland Security
U.S. Citizenship & Immigration Services
Nebraska Service Center
P.O. Box 87730
Lincoln, NE 68501-7730

There is a two-tiered process for family reunification. First, USCIS will review the application. During the USCIS review, you or your client may receive a “Request for Evidence” asking for additional proof regarding the relationship. Typically you have 87 days to respond to this request. Failure to provide the requested information without an explanation will result in a denial of the petition. USCIS can either approve or deny the petition. If it is denied, there is no appeal. The only option is to file a new I-730 petition, if it is still inside the two year time frame.

If the I-730 is approved, the file will be forwarded to the National Visa Center, and then onto the appropriate Consulate or Embassy. At this point, all action by USCIS is completed. The Consulate should contact the family members for an interview. The family members will then need to provide birth certificates or marriage certificates proving relationship to the asylee, along with passports and photographs, to the U.S. Consulate. Increasingly, there is additional scrutiny from the Consular posts and the client may be required to provide additional proof, or even DNA testing. If you encounter problems, call The Advocates for guidance since Consular practice varies from country to country.

Eligibility for Employment and a Social Security Number

As an asylee, your client is eligible to work in the United States. Your client **DOES NOT** need an Employment Authorization Document (EAD) to work in the U.S. Your client is eligible for an *unrestricted* social security card that along with proof of identity is sufficient to prove that he or she is eligible to work in the U.S.

Once your client is granted asylum, he or she should go to the Social Security office in person, with their I-94 card, to apply for an unrestricted social security card. For persons granted asylum, it is not necessary to obtain employment authorization. Persons granted asylum are authorized to work incident to their status as asylees. This is typically noted in the stamp on the I-94 card they receive. If they do not have a work permit, they should show their state ID and unrestricted social security card to the employer as evidence of their eligibility to work. Remind your client not to check the box on the I-9 form that

says “U.S. Citizen.” If your client encounters problems with an employer, there is a memo by USCIS that explains the work eligibility for asylees which is available at: http://www.uscis.gov/graphics/services/factsheet/howdoi/d2_english.pdf.

Driver’s License/State I.D.

Minnesota law requires that applicants for driver’s licenses/state identification cards present government-issued photo identification together with proof of valid immigration status. Your client may present a valid, unexpired passport together with the I-94 card marked “asylum status granted pursuant to section 208 of the INA” to the Department of Public Safety (DPS) when applying for Minnesota identification. If your client does not have a valid passport, they should obtain an Employment Authorization Document and present it to DPS.

Public Benefits

Asylees are entitled to certain public benefits. For the first seven years after being granted asylum, asylees are eligible for Social Security Income, Medicaid, and Food Stamps. Under the new welfare laws, an asylee’s entitlement to public benefits thereafter will depend on what date they entered the United States.

Match Grant

Asylees may enroll with refugee resettlement agencies’ “Match Grant” programs within 30 days of the asylum approval to receive specific employment and other services. Minnesota Council of Churches, Lutheran Social Services, Catholic Charities, International Institute of Minnesota, and World Relief all may be able to provide services.

Taxes

Asylees and applicants for asylum are required to report all income earned in the United States to the Internal Revenue Service (IRS) and to pay taxes on that income.

Right to Travel

An asylee is eligible to travel outside the U.S. However, *it is essential that the asylee not return to his or her home country until he or she has become a legal permanent resident.* If the asylee does return to his or her home country, the DHS could refuse to allow that individual to reenter the United States on the grounds that he or she implicitly no longer fears persecution. We do not encourage asylees to travel outside the U.S. until they are granted legal permanent resident status.

Should the asylee need to travel outside the United States, they must first obtain a Refugee Travel Document, using Form 1-131. This document serves as a travel document at foreign consulates for visas and entry into foreign countries, as well as permission to return to the U.S. in asylum status. There is a fee to apply for a travel

document, and the application should be made at least six months before the individual wishes to travel to allow for processing times at USCIS. If an emergency arises, such as the death of a relative, it is possible to request an expedited travel document, which typically can be done in two weeks. The travel document is valid for one year.

Lawful Permanent Residence Status

One year from the date of the asylum grant, the asylee is eligible to submit an application for adjustment of status to become a Lawful Permanent Resident (LPR). The asylee simply fills out and submits an adjustment of status application, fulfills the requirements, and then waits for approval of his or her adjustment. It is generally advisable for an attorney to assist the asylee with the application as a number of the questions regarding public benefits, past arrests, and removal proceedings are confusing to applicants and can cause problems if answered incorrectly. There are also certain situations in which a client may need a waiver of either a health problem or minor crime in order to be adjustable. If your client has used fraudulent documents to enter the U.S., he or she will need to complete an I-602 waiver. Also, if your client is HIV positive, he or she will also need an I-602 waiver. The Advocates works with the Minnesota Aids Project on many cases involving HIV positive asylees, so please call for a referral if this issue arises in your case. There are other situations where a waiver may be required; this is not an exhaustive list.

Due to recently eliminated caps on asylum adjustment and changes in the asylum adjustment program, there is still a backlog of pending applications. However there is movement and processing times are expected to decrease; recently filed applications have been processed in approximately a year.

The grant of LPR status by USCIS is discretionary. Adjustment can be denied for a number of reasons, particularly if they believe that conditions in the asylee's home country have improved such that he or she no longer fears persecution. Normally, the DHS does not deny adjustment, and it is virtually automatic in almost all cases.

The DHS has stated, however, that asylees from certain specific countries where the political climate has dramatically improved may not be automatically adjusted, but may be evaluated based on the specifics of the applicant's cases. Additionally, clients should be aware that the adjustment process includes fingerprint screening, including checks against criminal databases and immigration records in foreign countries.

Should you need assistance representing your client in this process, please contact The Advocates staff.

Draft Registration

All male U.S. citizens and male aliens residing in the U.S. must register for the Selective Service if they are between ages 18 and 25. Aliens illegally in the United States, refugees, asylum applicants, asylees, and lawful permanent residents all must register.

Failure to register may have negative immigration consequences and may result in denial of other federal benefits.

Change of Address Notification Requirements

All aliens (including Legal Permanent Residents) in the U.S. must notify the Department of Homeland Security within 10 days of moving to a new address using Form AR-11. Each individual in a household must file this form. The AR-11 may now be completed online at www.uscis.gov. Using the online option also allows you to update the client's address on any pending applications, such as permanent resident, employment authorization, or family petitions. It does not update the address with the court or the Asylum Office. Willful failure to notify the government of address change may be grounds for removal.

In addition to filling Form AR-11, the asylum applicant must notify each individual office with jurisdiction over pending immigration matter as follows:

- For applications pending at the Chicago Asylum Office: File a copy of the AR-11 with a cover letter and copy of the Acknowledgement of Receipt of Asylum Application with the Chicago Asylum Office.
- For aliens in Removal Proceedings: File Form EOIR-33/IC with the Immigration Court, serving DHS Office of District Counsel.
- For appeals pending at the BIA: File Form EOIR-33/BIA, serving DHS Office of District Counsel.
- For any petition or application pending at the DHS Nebraska Service Center: use the online change of address function or call the customer service number at 1-800-375-5283. Have the receipt number of the pending application, the A number, the name and date of birth of the client available.

Thank you!

Thank you for volunteering to assist with an asylum case. Without the help of volunteer attorneys, many of our clients would be removed to countries where they would suffer unspeakable harm. We appreciate the work you are doing on behalf of victims of human rights abuses.

We know that there may be other matters that arise over the duration of the asylum case. This manual is not exhaustive and is meant only as a starting point. Although we have made every effort to provide correct, comprehensive information in this manual, you should always refer to the statutes as there are frequent changes to the immigration laws. Please sign up on Probono.net, where we are able to provide frequent updates to volunteers as well as additional sample materials. Also please use the resources listed in this manual, the experience of your consulting attorney and the staff at The Advocates to assist you in your representation of your pro bono asylum client.

Thank you again for offering your time and skills to help an asylum seeker.

CONTACT INFORMATION

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IMPORTANT PHONE NUMBERS AND ADDRESSES

Office of Chief Counsel
2901 Metro Drive, Suite 100
Bloomington, 55425
Phone: (952) 853-2970
Fax: (612) 313-9073

Chicago Asylum Office
Kenneth Madsen, Director
Richard Hess (Credible Fear)
401 S. LaSalle St., 8th Fl.
Chicago, IL 60605
Phone: (312) 353-9607 (through 9610)
Fax: (312) 886-0204

Executive Office for Immigration Review
Immigration Court
7850 Metro Parkway, Suite 320
Bloomington, MN 55425
Phone: (612) 725-3765
Information Line: (800) 898-7180
Fax: (612) 725-3716

Immigration Judges
Judge Joseph R. Dierkes
Judge Kristin W. Olmanson

Board of Immigration Appeals (location)
5107 Leesburg Pike, Ste. 2000
Falls Church, Virginia 22041
Phone: (703) 605-1007

BIA Clerk's Office (mailing address)
P.O. Box 8530
Falls Church, VA 22041

Eighth Circuit Court of Appeals
Office of the Clerk
Thomas F. Eagleton Courthouse
Room 24-329
111 South 10th St.
St. Louis, MO 63102
Phone: (314) 244-2600

LEGAL RESOURCE MATERIALS

Sources for Case Preparation

For Asylum and Withholding Cases:

AILA's Asylum Primer: A Practical Guide to U.S. Asylum Law & Procedure, (5th Ed.) written by Regina Germain (UNHCR), published by AILA (American Immigration Lawyer's Association), 1400 Eye Street N.W., Suite 1200, Washington, DC 20005, Tel. (202) 371-9377, Fax (202) 371-9449.

Law of Asylum in the United States, 3rd edition, written by Deborah Anker, published by The Refugee Law Center, c/o Boston Book Co., 705 Centre Street, Suite 200, Boston, MA 02130, Tel. (617) 522-8400, Fax (617) 524-8400.

Winning Asylum Cases, written by Mark Silverman, Robert Jobe, and Larry Katzman, published by Immigrant Legal Resource Center, 1663 Mission Street #602, San Francisco, CA 94103, Tel. (415) 255-9499.

For CAT Cases:

World Organization Against Torture USA, 1015 18th Street N.W., Suite 400, Washington, D.C. 20036, Tel. (202) 861-6494. E-mail: msklar@igc.atc.org. Contact person: Morton Sklar.

Valuable Resources located on the Internet:

American Immigration Law Foundation (AILF's mission to promote understanding among the general public of immigration law and policy, through education, public analysis, and support to litigators. AILF maintains a series of Legal Action Practice Advisories for key issues in immigration law, as well as a Litigation Updates on their website. <http://www.ailf.org>

Center for Refugee and Gender Studies – UC – Hastings College of Law, The Center for Gender and Refugee Studies seeks to enhance the protection of women's human rights by providing expertise and resources in the cases of women asylum seekers. www.uchastings.edu/cgrs/

Probono.net, The Asylum Practice Area supports lawyers who are providing pro bono assistance to individuals seeking asylum in the United States. Probono.net is hosted by the Lawyer's Committee for Human Rights, Lawyer's Committee for Civil Rights of the San Francisco Bay Area, and Minnesota Advocates for Human Rights. Volunteer Attorneys who take cases from Minnesota Advocates are required to become members of probono.net to ensure that they continue to receive practice advisories and important legal updates. <http://www.probono.net>

Sources for Documentation

Amnesty International, Refugee Office, 500 Sansome St., Ste 615, San Francisco, CA 94111; Tel. (415) 291-0601; Fax (415) 291-8722.

<http://www.amnestyusa.org/refugee/index.html>

Human Rights Watch, Publications Dept. 485 5th Avenue New York, NY 10017-6104, Tel.(212) 986-1980. <http://www.hrw.org>

United Nations High Commissioner for Refugees, 1775 K Street, N.W., Third Floor, Washington, D.C. 20006; Tel. (202) 296-5191. <http://www.unhcr.ch>

www.asylumlaw.org, clearing house of asylum documentation resources.

**Also, look to agencies that do high volume asylum work – often someone, somewhere has had a case similar to yours. Call different non-profits and ask about availability of documentation. If you find that a particular decision is valuable to your case, contact the attorney of record.

ACRONYMS AND TERMS

AEDPA	Antiterrorism and Effective Death Penalty Act
AG	Attorney General
AO	Asylum Officer
APSO	Asylum Pre-Screening Officer
CBP	Customs and Border Protection
CIS	Citizenship and Immigration Services
ICE	Immigration and Customs Enforcement
BIA	Board of Immigration Appeals
CAT	Convention Against Torture
DD	District Director
DED	Deferred Enforcement Departure
DHS	Department of Homeland Security
EOIR	Executive Office of Immigration Review
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act
IJ	Immigration Judge
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Services
LPR	Lawful Permanent Resident
NACARA	Nicaraguan Adjustment and Central American Relief Act
NOID	Notice of Intent to Deny
NTA	Notice to Appear
OCC	Office of Chief Counsel for DHS/ICE
OSC	Order to Show Cause
TPS	Temporary Protected Status
UNHCR	United Nations High Commission for Refugees
USC	United States Citizen
VAWA	Violence Against Women Act

GLOSSARY OF IMMIGRATION TERMS

A

“A” Number: An eight digit number (or nine digit, if the first number is a zero) beginning with the letter “A” that the DHS gives to some non-citizens.

Adjustment of Status: A process by which a non-citizen in the United States becomes a lawful permanent resident without having to leave the U.S. INA § 245; 8 U.S.C. 1101 1255; 8 C.F.R. § 245.

Admission: The legal entry of a non-citizen into the U.S. after inspection and authorization by an immigration officer. INA § 101(a)(13)(A); 8 U.S.C. 1101(a)(13)(A).

Admissible: A non-citizen who may enter the U.S. because he or she is not excludable for any reason or has a waiver of excludability. INA § 214; 8 U.S.C. 1184.

Affidavit of Support: A form (I-134 or I-864) filed by a U.S. citizen or lawful permanent resident for a non-citizen seeking lawful permanent residence. INA § 213A; 8 U.S.C. § 1183(a); 8 C.F.R. § 213a.

Aggravated Felon: One convicted of numerous crimes set forth at INA § 101(a)(43); 8 U.S.C. 1101(a)(43). An aggravated felony includes many crimes, but the most common are: (1) drug trafficking—any crime involving distribution, importation or sale of drugs, no matter the amount or the sentence; (2) the crime of theft, robbery or burglary with one year sentence whether imposed or suspended; and (3) the crime of violence with a one year sentence whether imposed or suspended.

Alien: A person who is not a citizen or national of the United States. INA § 101(a)(3); 8 U.S.C. § 1101(a)(3).

Alien Registration Card: The technical name for a “green card,” which identifies an immigrant as having permanent resident status, also known as I-551.

Aliens Previously Removed: Ground of inadmissibility, for persons previously removed for anywhere from five years to twenty years depending on prior circumstances. INA § 212(a)(9); 8 U.S.C. § 1182(a)(9).

Aliens Unlawfully Present: Ground of inadmissibility for three years for one unlawfully present in the U.S. for more than 180 days but less than one year commencing April 1, 1997 or for ten years if unlawfully present for one year or more. INA § 212(a)(9)(B); 8 U.S.C. § 1182(a)(9)(B).

Asylee: A person who has been granted asylum in the United States.

Asylum: A legal status granted to a person who has suffered harm or who fears harm because of his or her race, religion, nationality, political opinion or membership in a particular social group. INA § 208; 8 U.S.C. 1158.

B

Beneficiary: A person who will gain legal status in the United States as a result of a visa petition approved by the DHS.

C

Cancellation of Removal: Discretionary remedy for an LPR who been a permanent resident for at least five years and has resided continuously in the United States for at least seven years after having been admitted in any status and has not been convicted of an aggravated felony, or anyone physically present in the United States for a continuous period of not less than ten years immediately preceding the date of such application, who has been a person of good moral character during such period, has not been convicted of certain offenses and who establishes that removal would result in extreme hardship to the U.S. citizen or LPR Spouse, parent, or child. INA § 240A; 8 U.S.C. § 1229b.

Child: The term “child” means an unmarried person under twenty-one years of age who is: (1) a legitimated child; (2) a stepchild; (3) a child legitimated under the law of the child’s residence or domicile, or under the law of the father’s residence or domicile; (4) an illegitimate child; (5) a child adopted while under the age of sixteen; and (6) a child who is an orphan. There is a significant amount of case law interpreting these categories. INA § 101(b)(1); 8 U.S.C. § 1101(b)(1).

Citizen (USC): Any person born in the fifty United States, Guam, Puerto Rico, or the U.S. Virgin Islands; or a person who has naturalized to become a U.S. citizen. Some people born abroad are also citizens if their parents were citizens. INA § 301; 8 U.S.C. § 1401.

Citizenship and Immigration Service (CIS): The agency under the Department of Homeland Security responsible for adjudicating benefits applications, including applications for asylum, permanent residence, and work permits.

Conditional Permanent Resident Status: A person who received lawful permanent residency based on a marriage to a U.S. citizen when the marriage was less than two years old at the time. Conditional residents must file a second petition with USCIS to remove the conditions within two years of receiving the conditional resident status in order to retain their U.S. residency and become lawful permanent residents. INA § 216, 8 U.S.C. § 1186(a).

Consular Processing: The process by which a person outside the United States obtain an immigrant visa at a U.S. consulate in order to travel to the U.S. and enter as a lawful permanent resident.

Conviction: Formal judgment of guilt entered by a court or, if adjudication of guilt was withheld, if a judge or jury has found the person guilty or the person has entered a plea of guilty or *nolo contendere* and has admitted sufficient facts to warrant a finding of guilt and the judge has ordered some form of punishment, penalty or restraint.

Credible Fear Interview: An interview that takes place if an alien who arrives in the United States with false documents or no documents, and is therefore subject to expedited removal, expresses a fear of persecution or a desire for asylum. Then interview usually takes place at a port of entry. The purpose of the interview is to determine if the alien can show that there is a significant possibility that he or she can satisfy the qualifications for asylum. INA § 235(b)(1)(B), 8 U.S.C. § 1225(b)(1)(B); 8 C.F.R. § 208.30.

Customs and Border Patrol (CBP): The agency under the Department of Homeland Security responsible for airport inspections, border inspections and patrol, and customs inspections.

D

Department of Homeland Security (DHS): The post 9-11 agency which oversees CIS, CBP and ICE, all of which were formerly the DHS under the Department of Justice.

Deportable: Being subject to ejection from the U.S. for violating an immigration law, such as entering without inspection, overstaying a temporary visa, or being convicted of certain crimes. INA § 237; 8 U.S.C. § 1227.

Deportation: The ejection of a non-citizen from the United States. A deported person cannot ordinarily reenter the United States for five years, or twenty years if deported for certain crimes. A non-citizen cannot be deported without a hearing, unless he or she has been convicted of certain crimes, and is not an LPR. INA §240 & 241; 8 U.S.C. 1229A.

E

Entry: Being physically present in the U.S. after inspection by CBP or after entering without inspection.

Entry without inspection (EWI): Entering the United States without being inspected by CBP, such as a person who runs across the border between the U.S. and Mexico or Canada. This is a violation of the immigration laws. INA § 212(a)(6); 8 U.S.C. § 1182(a)(6).

Employment Authorization Document (EAD): The card that the CIS issues to a person granted permission to work in the U.S. The EAD is a plastic, wallet-sized card

Excludable: Being inadmissible to the U.S. for violating an immigration law, such as for not possessing a valid passport or visa, or for having certain communicable diseases, such as HIV, or for having been convicted of certain crimes. INA § 212; 8 U.S.C. 1182.

Exclusion: The ejection of a non-citizen who has never gained legal admission to the U.S., even though, the person may have been physically present in the U.S. Exclusion cannot happen without a hearing unless the non-citizen waives the right, and prevents reentry for one year, unless the DHS grants an exception.

Executive Office for Immigration Review (EOIR): The Immigration Court, the Board of Immigration Appeals, and one other agency within the Department of Justice which decide immigration cases.

Expedited Removal: An abbreviated removal procedure applied to aliens who arrive in the United States with false documents or no documents. INA § 235; 8 U.S.C. § 1225.

I

I-94 Card: A small white paper card issued by the DHS to most non-citizens who do not have green cards upon entry to the U.S. It is usually stapled to a page of the non-citizen's passport. The DHS may also Issue I-94 cards in other circumstances.

Illegal Alien: *See* "Undocumented".

Immediate Relative: The spouse, parent, or unmarried child under 21 of a U.S. citizen. Generally speaking, the immigration laws treat immediate relatives better than other relatives of citizens or legal permanent residents. INA § 221, 224; 8 USC § 1201, 1204.

Immigrant: A person who has the intention to reside permanently in the United States; usually a lawful permanent resident. INA § 101(a)(15); 8 U.S.C. § 1101(a)(15).

Immigrant Visa: A document required by the INA and required and properly issued by a consular office outside of the United States to an eligible immigrant under the provisions of the INA. An immigrant visa has six months validity. INA § 203; 8 U.S.C. § 1153.

Immigration and Customs Enforcement (ICE): Agency of the Department of Homeland Security that is responsible for the arrest and detention of immigrants, and for enforcing immigration law violations.

Immigration and Naturalization Service (DHS): Before the creation of the DHS, the branch of the United States Department of Justice charged with enforcing the immigration laws.

Immigration Judge: Presides over removal proceedings. INA § 101(b)(4); 8 U.S.C. § 1101(b)(4).

Inadmissible: A non-citizen who is ineligible to receive a visa and ineligible for admission to the United States. *See also* Excludable. INA § 212; 8 U.S.C. § 1182.

Inspection: The CBP process of inspecting a person's travel documents at the U.S. border or international airport or seaport. INA § 235; 8 U.S.C. § 1225.

L

Lawful Permanent Resident (LPR): A person who has received a "green card" and whom the DHS has decided may live permanently in the U.S. LPRs eventually may become citizens, but if they do not, they could be deported from the U.S. for certain activities, such as drug convictions and certain other crimes. INA § 245; 8 U.S.C. § 1255

N

Native: A person born in a specific country.

National: A person owing permanent allegiance to a particular country. INA § 101(a)(21); 8 U.S.C. § 1101(a)(21).

Naturalization: The process by which an LPR becomes a United States citizen. A person must ordinarily have been an LPR for five years before applying for naturalization. A person who became an LPR through marriage to a U.S. citizen and is still married to that person in most cases may apply for naturalization. After three years as an LPR. INA § 310; 8 U.S.C. § 1421.

Nicaraguan Adjustment and Central American Relief Act (NACARA): Legislation passed by Congress in 1997 to restore the opportunity for certain individuals present in the U.S. to adjust to permanent resident status. The legislation covers Cubans and Nicaraguans, Salvadorans, and certain East Europeans of Former Soviet Bloc Countries. Under the legislation, different requirements apply to each group. 8 C.F.R. § 245.13; Pub. L. 105-100 (111 Stat. 2160, 2193) at 65 FR 15846.

Non-citizen: A person who is not a citizen of the U.S., whether legal or undocumented. Referred to in the INA as an "alien."

Nonimmigrant: A person who plans to be in the U.S. only temporarily, such as a person with a tourist or student visa. A nonimmigrant will ordinarily have a visa stamp in his or her passport, and an I-94 card that states how long the person can stay in the U.S.

Nonimmigrant Visa: A document issued by a consular officer signifying that the officer believes that the alien is eligible to apply for admission to the U.S. for specific limited purposes and does not intend to remain permanently in the U.S. Nonimmigrant visas are temporary. INA § 101(a)(15); 8 U.S.C. § 1101(a)(15).

Notice to Appear: Document issued to commence removal proceedings, effective April 1, 1997. The “NTA” must list the nature of the proceedings, the legal authority for proceedings, and the allegations and charges of violations under the INA. INA § 239; 8 U.S.C. § 1229.

Order to Show Cause: Document issued to commence deportation proceedings prior to April 1, 1997.

Overstay: To fail to leave the U.S. by the time permitted by the DHS on the nonimmigrant visa (as ordinarily indicated on the I-94 card), or to arrange other legal status by that time. INA § 237(a)(1); 8 U.S.C. § 1227(a)(1).

P

Parole: To permit a person to come into the U.S. who may not actually be eligible to enter—often granted for humanitarian reason, or to release a person from DHS/ICE detention. A person paroled in is known as a “parolee.” INA 212(d)(5); 8 U.S.C. § 1182 (d)(5).

Petitioner: A U.S. citizen or LPR who files a visa petition with the DHS/USCIS so that his or her family member may immigrate. *See* INA § 204 (explaining who may “petition” to classify a relative as an LPR); 8 U.S.C. § 1154.

Priority Registration Date (PRD): Everyone who files an I-130 Petition For Alien Relative receives a priority registration date. Once a person’s PRD becomes current, he or she can apply for LPR status. This may often take a long time, until a visa number becomes available. 8 C.F.R. 204.1(c).

R

Refugee: A person who is granted permission while outside the U.S. to enter the U.S. to enter the U.S. legally because of harm or feared harm due to his or her race, religion, nationality, political opinion or membership in a particular social group. INA § 101(a)(42); 8 U.S.C. § 1101(a)(42).

Relief: Term used for a variety of grounds to avoid removal.

Removal: Proceedings to enforce departure of persons seeking admission to the U.S. who are inadmissible or persons who have admitted but who are now removable. INA § 237; 8 U.S.C. § 1227.

Rescission: Cancellation of prior adjustment to permanent resident status.

Residence: The principal and actual place of dwelling.

Respondent: The term used for the asylum seeker/person in removal proceedings.

S

Service Centers: Office of the DHS that decide most visa petitions. There are four regional Service Centers for the entire U.S.: the Vermont Service Center (EAC); the Texas Service Center (SRC); the California Service Center (WAC); and the Nebraska Service Center (LIN). See uscis.gov/graphics/fieldoffices/service_centers/index.htm

Stowaway: One who obtains transportation on a vessel or aircraft without consent through concealment. INA § 101(a)(49); 8 U.S.C. § 1101(a)(49).

Suspension of Deportation: Commonly referred to as “Suspension.” A way for a non-citizen to become a lawful permanent resident. Historically, suspension has only been available to a person who is in deportation proceedings. The non-citizen usually must show that he or she has resided continuously in the United States for at least seven years, is a person of good moral character, and either he or she or his or her U.S. citizen or LPR relative will suffer extreme hardship if he or she is deported. In the Violence Against Women Act, Congress created a new “suspension of deportation” for spouses and children of U.S. citizens or LPRs who can show that they have been victims of domestic violence or sexual abuse. Among other categories, these persons need only prove three years of continuous residence in the U.S. Only available to individuals in deportation proceedings, not those in removal proceedings. See also: Cancellation of Removal.

T

Temporary Protected Status (TPS): A status allowing residence and employment authorization to the nationals of foreign states, for a period of not less than six months or more than eighteen months, when such state (or states) has been appropriately designated by the Attorney General because of extraordinary and temporary conditions in such state (or states). INA § 244; 8 U.S.C. § 1254(a).

U

Undocumented: A non-citizen whose presence in the U.S. is not known to the USCIS and who is residing here without legal immigration status. Undocumented persons include those who originally entered the U.S. legally for a temporary stay and overstayed or worked without USCIS permission, and those who entered without inspection. Often referred to as “illegal aliens.”

V

Violence Against Women Act (VAWA): Legislation passed by Congress in 1994, which contained certain provisions. The immigration law provisions allow a spouse and children, or parents of children, who have been abused or subject to extreme cruelty by their permanent resident or United States citizen spouse or parent to immigrate without the assistance of the LPR or USC spouse or parent, provided that they meet certain

conditions. Reauthorized in 2005, as Public Law No: 109-162; INA § 204(a)(1)(A)(iii); 8 U.S.C. § 1154(a)(1)(A)(iii).

Visa: A document (or a stamp placed in a person's passport) issued by a United States consulate abroad to a non-citizen to allow that person to enter the U.S. Visas are either nonimmigrant or immigrant visas. INA 101(a)(16) & (26); 8 U.S.C. § 1101(a)(16) & (26).

Visa Petition: A form (or series of forms) filed with the USCIS by a petitioner, so that the USCIS will determine a non-citizen's eligibility to immigrate. INA § 204(a)(1)(A)(i); 8 U.S.C. § 1154(a)(1)(A)(i); See www.uscis.gov for examples, including the I-130.

Voluntary Departure: Permission granted to a non-citizen to leave the U.S. voluntarily. The person must have good moral character and must leave the U.S. at his or her own expense, within a specified time. A non-citizen granted voluntary departure could reenter the U.S. legally in the future. INA § 240B; 8 U.S.C. § 1229c.

W

Waiver of Ground of Exclusion: The excusing of a ground of exclusion or removal by the USCIS or the Immigration Court. See *Generally*: INA § 212; 8 U.S.C. § 1182 (laying out grounds for inadmissibility and waivers available).

Work Permit: There is no single document in U.S. immigration law that is a "work permit." Citizens, nationals, and lawful permanent residents are authorized to be employed in the U.S. Certain nonimmigrant visa categories include employment in the U.S. Other aliens in the U.S. may have the right to apply for an Employment Authorization Document (EAD). 8 C.F.R. 274a.12.